THE
MODERN LAW REVIEW

Volume 17 September 1954 No. 5

NEGLIGENCE AND INTEREST

THE purpose of this article is to suggest that the concept of the duty of care in the tort of negligence requires analysis with reference to the interest of the plaintiff of which invasion is alleged. Not only, it is suggested, must the plaintiff show that in the circumstances the defendant owed him a duty of care; he must show further (but need show only) that the duty pertained to a specific interest of his, being the specific interest damaged. The duty "must be specifically due to the plaintiff and to some particular interest of his." [1]

This analysis has not been developed, so far as I am aware, in any English textbook [2] nor does it appear greatly to have been discussed in legal periodicals.[3] A recent exception [4] apart, the possibility of making the analysis is not explicitly recognised in the authorities. This is understandable, for the tort of negligence, though growing apace, is yet young, and few cases have so far come before the courts in which the approach suggested would have made any difference. It is interesting to note that the American *Restatement* frames a similar suggestion in these words [5]:

> "Conduct may be negligent, because it involves an unreasonable risk of invading one of a particular species of interests,

1 Lord Wright at p. 398 of his article "Re Polemis" in 14 M.L.R. 393.

2 Including Beven on *Negligence*, 4th ed.; Pollock, *Torts*, 15th ed.; Salmond, *Torts*, 11th ed.; Winfield, *Torts*, 5th ed.; Halsbury's *Laws of England* (Hailsham ed.), *sub tit.* "Negligence." The problem is recognised in Clerk and Lindsell on *Torts*, 10th ed., at p. 353, and in Charlesworth on *Negligence*, 2nd ed., at pp. 14 and 17, but there is no full discussion. Prosser, *Torts* (1941), at pp. 187–8 shortly adverts to the analysis here suggested but regards it as an "unnecessary refinement" having regard to the rules as to superseding causes. *Sed quaere*; the most difficult problems are those not involving superseding causes.

3 There are passing references in 14 M.L.R. at pp. 398 and 400 (Lord Wright) and in *Essays in Jurisprudence* (Dr. Goodhart), p. 149, note 65. Mr. D. J. Payne, in his article "The 'direct' consequences of a negligent act" (1952 *Current Legal Problems*) appears to accept the limitation of duties of care to specific interests as "implicit in the modern development of the law of negligence" (p. 199). Tilley, in 33 Mich. Law Rev. pp. 847–51, also accepts the limitation and so explains *Liesbosch* v. *Edison* [1933] A.C. 449.

4 *King* v. *Phillips* [1953] 2 W.L.R. 526 (C.A.), the judgment of Denning L.J.

5 *Restatement*, Torts, Negligence, S. 281, Comment g.

such as an interest of personality, but may involve no realisable risk of invading an interest of another species, such as an interest in land or chattels. If so, the actor is liable for the harm done to any interest in personality, even though it be different to that the risk to which made his conduct negligent. He is, however, not liable for harm done to land or chattels belonging to the person as to whose interests of personality the actor's conduct was negligent. Similarly, if the actor's conduct involves a risk only to the land or chattels of another, the actor is not liable for harm unexpectedly done to any of the other's interests of personality."

So far as I have been able to trace, this Comment has not been examined in the American courts, although its substance was foreshadowed in *Palsgraf* v. *Long Island S.S.*[6] by Cardozo C.J.[7] Our discussion, therefore, will centre largely in considerations of principle and convenience.

It seems desirable first to say a word about *Re Polemis*.[8] This very much discussed case has a dual authority. It deals both with the duty of care required in negligence and with remoteness of damage. So far as the latter topic is concerned, the reader will be pleased to learn that nothing is here to be added to the existing literature.[9] In so far as *Re Polemis* is an authority upon the nature of the duty of care it decides that such a duty exists if the defendant ought reasonably to foresee damage to the plaintiff in the circumstances, and that it is immaterial that the damage in fact caused is not the exact kind of damage foreseen. This article assumes the correctness of *Re Polemis* in so far as it asserts that proposition. The proposition, however, should be understood within the confines of a single interest of the plaintiff. In *Re Polemis* itself both the foreseeable and the unforeseeable damage was to the same [10] interest of the plaintiffs, *i.e.*, their interest in the physical safety of their chattels. It was not therefore necessary for the Court of Appeal to lay down any wider principle than the limited one proposed, nor indeed does it appear in fact to have done so.[11, 12]

[6] (1928) 248 N.Y. 339, discussed Goodhart, *op. cit.*, p. 129.

[7] At p. 346, quoted Goodhart, *op. cit.*, p. 149.

[8] [1921] 3 K.B. 560.

[9] The wealth of which has been recently further enriched by Lord Wright, *op. cit.*; by Messrs. J. F. Wilson and C. J. Slade in 15 M.L.R. 458; and by Dr. Goodhart in 68 L.Q.R. 514.

[10] The principles upon which different interests may be distinguished are discussed below.

[11] The remarks of Bankes L.J. at the top of p. 572 of the report (*supra*, note 8) relate not to duty but to remoteness.

[12] The policy considerations which indicate a polarisation of the duty of care in terms of the plaintiff's interest necessarily involve as a practical corollary a similar polarisation of the remoteness rules. Otherwise, a court would be free to hold that the infliction of foreseeable damage to interest X carried with it responsibility for unforeseeable but directly consequential damage to interest Y. There would be nothing illogical in such a proposition, just as there is nothing illogical in the proposition that if an actor is negligent with regard to consequence A he may be responsible for consequence B which,

The thesis advocated is that it is at once necessary and sufficient for the plaintiff to show that the defendant owed him a duty of care in respect of his specific interest affected. Let us first see if this accords with principle. A duty of care in the defendant is correlative to a right in the plaintiff to have care taken. A "right" in the legal sense (with which sense we are alone concerned) is an interest of the plaintiff which the law in some way protects.[13] An "interest" is an element in human well-being which the plaintiff values and wishes to safeguard. Familiar examples are the interest in bodily safety, in reputation, and in freedom from malicious prosecution.[14] This definition of right in terms of interest seems firmly established and generally accepted.[15] The problem of distinguishing between one interest and another for the purpose of the tort of negligence will be discussed later. For the moment it suffices to appreciate that a consequence of the above propositions is that although any one interest may be protected by a plurality of rights,[16] no one right can protect more than one interest. Thus, so far as tort is concerned, my interest in the physical safety of my watch is protected by several distinct rights (*e.g.*, in trespass, in negligence, in conversion). In certain circumstances, it may be protected by one such right only. It cannot, however, by definition be protected by less than one right—by, so to speak, a partial right, the remainder of which protects an entirely different interest. If there are two interests protected, two rights exist. If there are two rights, there must be two duties, and if both interests are invaded both duties are broken and not one tort is committed, but two. Another aspect of the law of negligence provides an analogy. A cannot found an action for negligence upon a duty owed solely to B. This is a logical truism, but if authority is needed for it then *Bourhill* v. *Young* [17] supplies it. Hence, if the same negligent act injures both X and Y, to each of whom a duty of care is owed by Z, then there are two breaches of duty and two torts. No one would dream of saying that merely because only one negligent act

although unforeseeable by him, flows directly from A. Obviously the former proposition, if accepted, would partly undermine the interest theory. On one view, the proposition has been rejected by H.L. in *The Edison* (see *per* Lord Wright in *Bourhill* v. *Young* [1943] A.C. 92 at p. 110).

13 The exact nature of this protection is a disputed question into which we need not go.

14 For a valuable discussion see "Interests in Personality" by Roscoe Pound in "Selected Essays on the Law of Torts" (Harvard Law Rev.Assn.). See also Paton, *Jurisprudence*, 2nd ed., pp. 123 *et seq*; Green, *Judge and Jury* (1930), pp. 4–8.

15 See Paton, *op. cit.*, pp. 218–24; Salmond, *Jurisprudence*, 10th ed., pp. 229–37; Allen, *Legal Duties* (1931), pp. 182–3; Stone, *Province and Function of the Law*, Chaps. XX and XXI.

16 The word "right" is used in the singular to include a right *in rem*, although it is arguable that the latter concept embraces a multiple of rights of similar content but dissimilar incidence. See the treatment of Hohfeld in *Fundamental Legal Conceptions*, pp. 91 *et seq.*

17 [1943] A.C. 92.

had occurred, therefore only one tort of negligence had been committed. Unity of act is legally insignificant. Two separate rights have been infringed. Should we not also say, that if the same negligent act injures two distinct interests of the one plaintiff, then there are two breaches of duty and two torts committed? For here also two distinct rights have been infringed, although they inhere in one person instead of in two.

In one part of the law of torts this exegesis is firmly established. In cases where a plaintiff has suffered damage to two distinct interests and has recovered in respect of damage to the one he has not been estopped from bringing a second action in respect of damage to the other.[18] In the leading case of *Brunsden* v. *Humphrey* [19] the plaintiff brought an action in the county court for damage to his cab occasioned by the negligence of the defendant's servant and, having recovered the amount claimed, afterwards brought an action in the High Court against the defendant, claiming damages for personal injury sustained by him through the same negligence. By a majority,[20] the Court of Appeal held that the High Court action was not barred by the county court judgment. As Brett M.R. pointed out,[21] the question in such cases is whether there are two causes of action or one; if there is but one cause of action the second suit is not maintainable. The pith of his judgment is to be found in these words [22]:

> "The collision with the defendant's van did not give rise to only one cause of action: the plaintiff sustained bodily injuries, he was injured as of a distinct right, and he became entitled to sue for a cause of action distinct from the cause of action in respect of the damage to his goods: therefore the plaintiff is at liberty to maintain the present action."

Bowen L.J. said [23]:

> "Two separate kinds of injury were in fact inflicted, and two wrongs done. The mere negligent driving in itself, if accompanied by no injury to the plaintiff, was not actionable at all, for it was not a wrongful act at all until a wrong arose out of the damage which it caused. One wrong was done as soon as the plaintiff's enjoyment of his property was substantially interfered with. A further wrong arose as soon as the driving also caused injury to the plaintiff's person."

Coleridge L.C.J., in his short dissenting judgment,[24] did not deny that in the case before him the injury done to the plaintiff was one done to him at one and the same moment by one and the same act

[18] This matter is discussed in Salmond, *Torts*, 11th ed., pp. 180 *et seq.*; Clerk and Lindsell, *Torts*, 10th ed., pp. 238 *et seq.*; Mayne on *Damages*, 11th ed., pp. 139 *et seq.*

[19] (1884) 14 Q.B.D. 141.

[20] Brett M.R. and Bowen L.J.; Coleridge L.C.J. diss.

[21] At pp. 144–5.

[22] At p. 145.

[23] At p. 150.

[24] At pp. 152–3.

in respect of different *rights*, but nevertheless he curiously refused to draw from that premise the conclusion that there were two causes of action and not one.

This decision has been repeatedly followed, notably by a strong Court of Appeal [25] in *The Oropesa*.[26] In that case, a sailor had been killed through the negligence of the defendants. His personal representatives, having recovered judgment against the defendants in respect of the loss of the deceased's personal effects, now brought a second action in respect (*inter alia*) of his loss of expectation of life. The Court of Appeal held the action maintainable. Lord Wright said [27]:

> " . . . although the claim is in respect of the same negligence, the damages claimed are in respect of the infringement of different rights. That being so, the fact that the plaintiffs brought an action in which they recovered damages for injury to the one right, namely the injury to chattels, does not prevent them bringing an action for an injury to an entirely different right, that is to say, an injury to the person, including loss of life."

On the other hand, *Fitter* v. *Veal* [28] decides that if the damage in the second action is damage to the same interest as the first, the plaintiff is estopped. This is the leading authority for the well-known " once and for all " rule in personal injury cases. Similarly, the plaintiff in *Brunsden* v. *Humphrey* could not have sued one day for a broken wheel and next month for a broken shaft and later for a broken window and so forth.[29] The law has, for the purpose of applying the rules of *res judicata*, drawn certain broad lines between one interest of the plaintiff and another.[30] In the same way, loss of expectation of life is merely a head of damage in an action for injury to the person, so that if there is judgment or satisfaction in an action for personal injuries there can be no surviving cause of action in respect of loss of expectation of life: *Derrick* v. *Williams*.[31]

The relevance of these authorities on estoppel to the analysis of the duty of care is, it is suggested, twofold. First, they show that it is possible to distinguish between different interests of a plaintiff and that the courts have actually applied such distinctions. Secondly, they imply that invasion of more than one interest involves the commission of more than one tort.

25 Lord Wright, Scott and MacKinnon L.JJ.
26 [1943] P. 32.
27 At p. 35.
28 (1701) 12 Mod. 542.
29 As Sankey L.J. (sitting in the Divisional Court) pointed out in *Conquer* v. *Boot* [1928] 2 K.B. at p. 340.
30 Examples from parts of the law of tort other than negligence are *Gibbs* v. *Cruickshank* (1873) L.R. 8 C.P. 454 (trespass to the plaintiff's land and goods on one occasion; judgment in action of replevin no bar to subsequent action for trespass to land); *Guest* v. *Warren* (1854) 9 Ex. 379 (action for trespass does not bar subsequent action for malicious prosecution, even if both actions arise out of the same circumstances).
31 [1939] 2 All E.R. 559 (C.A.).

Let us inquire if this manner of looking at the duty of care, which appears justified on *a priori* grounds, conduces in practice to a just result. The interests protected by the law of negligence are few. Of these few, the two most important are the interest a person has in the freedom of his body from physical injury and the interest a person has in the freedom of his chattels [32] from physical injury. We may term these the " body-safety " and the " chattel-safety " interests. If we consider for a moment these two interests alone, the justice of the proposition advocated (that foreseeability of harm to the interest affected is at once necessary and sufficient) seems self-evident. Certainly, it must be *sufficient* to show foreseeable harm to the interest affected. If I drive along the road near your stationary car, I owe you a chattel-safety duty in respect of it. If I negligently collide with it, how can it possibly matter whether you are inside the car (in which case I should also owe you a body-safety duty) or a hundred miles away (in which case I should owe you no such duty)? The harm is to a chattel; therefore chattel-safety duty alone is in issue. Conversely, foreseeability of harm to the interest affected is *necessary*. If (to adapt the facts of the *Palsgraf* case) [33] A is carrying a parcel containing B's fireworks, B standing fifty yards away, and C as he passes negligently knocks the parcel from A's hands (being ignorant of its contents) and it explodes injuring B, C clearly owes B a chattel-safety duty but no body-safety duty. Obviously, B can recover from C in respect of the damage to his fireworks, but it is contrary to common sense to regard the fact of B's ownership as in the least degree relevant to his right to recover in respect of his bodily injury. This result can only be obtained, consistently with *Re Polemis*, by treating B's interests separately. Again, suppose that in *Re Polemis* itself the " *Thrasyvoulos* " had been owned by an individual, X, and that X and his friend, Y, had been on board at the time of the explosion and had both received personal injuries. The stevedores ought reasonably to have foreseen *some* damage to the ship (*i.e.*, to X's chattel-safety interest); therefore they are liable for all damage to the ship, however extensive. They could reasonably foresee no damage to X's body-safety interest, and no damage to any interest of Y whatsoever. Y clearly has no remedy. Justice demands that if Y cannot recover in respect of bodily injury, nor should X so recover. This result can again only be obtained by treating X's interests separately, when considering what type of duty is owed to him in the circumstances.[34]

Let us now see what results this approach will yield when applied to another class of case—the " nervous shock " case. This branch

[32] *i.e.*, chattels possessed or owned by him.

[33] *Supra*, note 6.

[34] The enigma of the falling tumbler, put by Porter J. (as he then was) at p. 184 of his article on " Re Polemis " in 5 C.L.J. may be resolved by parity of reasoning.

of the law has been much discussed, and it is not desired to add unnecessarily to what has already been written upon it.[35] It is clear from *Hambrook* v. *Stokes*,[36] *Bourhill* v. *Young*,[37] and *King* v. *Phillips*[38] that a person's desire to be free from such nervous shock as results in physical illness is an interest now protected by the law of negligence as such, and is no longer to be regarded as an interest accorded a mere parasitic protection by the operation of the rules of remoteness of damage. We are here in the presence of the development described by Street[39]: "The treatment of any element of damage as a parasitic factor belongs essentially to a transitory stage of legal evolution. A factor which is today recognised as parasitic will, forsooth, tomorrow be recognised as an independent basis of liability." The clear[40] implication of *Bourhill* v. *Young* is that foresight of nervous shock[41] is alone the relevant consideration, and this implication is firmly appreciated[42] in *King* v. *Phillips*. In other words, foresight of damage to the particular interest of the plaintiff affected is both necessary and sufficient, and foresight of damage to any other interest of his (in particular, to his body-safety interest) is completely irrelevant. Thus, a theory of negligence based on interest seems to answer what has been termed[43] the "main problem which remains in the shock cases" in a manner consistent with the leading authorities. Unfortunately, this agreeable harmony has suffered the entry of discordant voices. In *King* v. *Phillips* there are certain observations, unnecessary to the decision[44] (which rests, like *Bourhill* v. *Young*, simply upon absence of duty in the circumstances), which seem to take a different view of the question of principle and which, therefore, must be critically examined. The facts of the case, as set out in the headnote, were that a taxicab driver backed his taxicab into a small boy on a tricycle. The damage to the boy and his tricycle was slight, but his mother heard him scream and, looking out of an upstairs window some 70 or 80 yards away, saw the tricycle under the taxicab but could not see the boy. He eventually ran home, but his mother had suffered nervous shock, an injury for which she claimed damages. The case was tried before McNair J.[45] who held that the

35 The authorities are collected and discussed in a recent article: "Shock Cases and Area of Risk" by Dr. Goodhart, in 19 M.L.R. 14, with whose conclusions the present writer cordially agrees. The important analysis of Evatt J. (diss.) in *Chester* v. *Waverley Corporation* 62 C.L.R. 1 should be added to the judgments there referred to.

36 [1925] 1 K.B. 141 (C.A.).

37 *Supra*, note 17.

38 *Supra*, note 4.

39 *Foundations*, i. p. 470.

40 The view of Lord Thankerton alone is obscure.

41 This phrase is used throughout in its special legal sense which involves consequent physical illness.

42 *Per* Singleton L.J. at p. 530; *per* Denning L.J. at pp. 531–2. Hodson L.J. does not discuss matters of principle at any length.

43 By Dr. Goodhart in 16 M.L.R. at p. 22.

44 Criticism of the decision itself lies outside the ambit of this article. It is discussed by Dr. Goodhart in 69 L.Q.R. 347.

45 [1952] 2 All E.R. 459.

defendant was under no liability to the mother. She appealed to the Court of Appeal. In the course of his judgment in favour of dismissing the appeal Singleton L.J. said [46] :

> " The decision of the House of Lords in *Bourhill* v. *Young* shows that the test in such cases is whether the driver could reasonably have foreseen any damage to the plaintiff; unless he could, it was said, no duty was owed to her, and consequently there was no negligence *vis-à-vis* the plaintiff. I find it difficult to draw a distinction between damage from physical injury and damage from shock; prima facie one would think that if a driver should have reasonably foreseen either, and damage resulted from the one or from the other, the plaintiff would be entitled to succeed. It is, however, unnecessary to consider this somewhat academic point for the purposes of this appeal for, on the finding of McNair J., no reasonable driver (or hypothetical bystander) would have anticipated damage of any kind to the plaintiff. That is a finding of fact with which this court ought not to interfere."

For the reasons we have already given it is difficult to accept that reasonable foresight of injury to the one interest should be sufficient to ground an action in respect of actual injury to the other, any injury to which being *ex hypothesi* unforeseeable. If I, standing next to you, carelessly drop a book on your foot, then I am liable for the resultant bruise (which is foreseeable) and also for unforeseeable physical consequences to you due (let us say) to your peculiar susceptibilities (for these are damage to the same interest). But if, owing to some psychopathic condition of yours of which I am ignorant, you suffer nervous shock (which is unforeseeable) upon what principle should I pay for that? Conversely, if I *know* that little Tommy's mother is watching him from a second-floor window as he plays in the street, and I nevertheless drive my motor-car at a reckless speed towards him and thereby kill him under her eyes, and she suffers shock, I am surely [47] liable to her in respect of it because shock is foreseeable. Now suppose that little Tommy, unknown to me, has a stick of dynamite in his pocket which explodes and physically injures his mother. I can foresee no physical injury to the mother whatsoever. Upon what principle should I pay for such physical injury, when all I could reasonably foresee was injury to a different interest of hers? A person standing in the street a quarter of a mile away who was hit by a fragment thrown out by the explosion would clearly have no cause of action of any kind against me. Why should the mother be placed in any better position, so far as recovery for unforeseeable physical injury is concerned, because she already has a right to recover in respect of shock? This converse case is complicated by the fact that since " nervous shock " is for legal purposes " nervous shock followed by

[46] [1953] 2 W.L.R. at pp. 530–1.

[47] The imagined facts are far stronger than those of *King* v. *Phillips* itself.

physical illness " it may well be argued that there is always involved in foresight of nervous shock foresight of physical injury also. Even if this be so [48] it would not be unreasonable, bearing in mind that the requirement of physical illness is an evidentiary one which the advance of medical science may eventually render unnecessary, to disregard, when distinguishing between bodily and nervous injury, such physical illness as is caused through the medium of shock and is legally relevant only to the question whether the shock is sufficiently serious to rank for recovery.

Even greater objection, it is respectfully submitted, may be taken to certain passages in the judgment of Denning L.J. Speaking of the apparent conflict between *Hambrook* v. *Stokes* [49] and *Bourhill* v. *Young*,[50] Denning L.J. says [51] :

> " I am not sure that the whole difficulty does not arise because of the different senses in which we speak of the duty of care. Take the case of the fish-wife. Although the House of Lords held that the motor-cyclist was under no duty to her, that must mean that he did not owe her a duty in regard to physical injuries if it had so happened that she had suffered any. In that regard he was clearly under a duty to her to drive with reasonable care. Suppose, for instance, that his negligence had caused her to be physically injured in some way or other. This was admittedly improbable, but it was not altogether outside the realms of possibility. She was standing at a point where she might conceivably have been struck. The excessive speed of the motor-cyclist existed before the impact. He was not to know what vehicles would appear in his path. He might have collided with some other negligent car coming in some other direction, and as a result of the collision one or other of the vehicles might have been flung back on to her. One can never tell how vehicles will finish up after an accident. The risk of her being struck might be remote, but no matter how remote it was, and no matter how much it was outside the contemplation of the cyclist, nevertheless if the fish-wife had actually been struck as a result of his negligence, or of the negligence of him and others, she would have a cause of action in damages against him."

These are interesting speculations, but there seems nothing in the speeches delivered in *Bourhill* v. *Young* to suggest that their Lordships thought that the motor-cyclist owed the fish-wife a duty in regard to physical injuries. They seem in fact to have thought precisely the reverse.[52] Furthermore, the test laid down by Denning L.J. for determining the existence of a duty of care appears with

[48] As appears both from principle and from certain observations in *Bourhill* v. *Young*.
[49] *Supra*, note 36.
[50] *Supra*, note 17.
[51] At p. 532.
[52] See *per* Lord Thankerton at pp 99–100; *per* Lord Russell of Killowen at p. 102; *per* Lord MacMillan at p. 105; *per* Lord Wright at p. 111; and *per* Lord Porter at p. 118.

respect to be too wide [53] and to conflict with the leading authorities and in particular with the decision of the House of Lords in *Bolton* v. *Stone*.[54] A little later in his judgment Denning L.J. goes on to say [55]:

> "What is the reasoning which admits a cause of action for negligence if the injured person is actually struck, but declines it if he only suffers from shock? I cannot see why the duty of a driver should differ according to the nature of the injury. I should have thought that every driver was under a plain duty which he owed to everyone in the vicinity. He ought to drive with reasonable care. If he drives negligently, with the result that a bystander is injured, then his breach of duty is the same, no matter whether the injury is a wound or is emotional shock. Only the damage is different. The bystander may be so close as to be put in fear for himself, or he may be just a little way off and be shocked by fear for the safety of others. In either case he has been injured by the driver's negligence. If you view the duty of care in this way, and yet refuse to allow a bystander to recover for shock, it is not because there was no duty owed to him, nor because it was not caused by the negligence of the driver, but simply because it was too remote to be admitted as a head of damage."

This passage exemplifies the difficulty which faces those who seek to bring injury to two different interests within the compass of a single duty of care. If the justice of the case demands recovery in respect of the one interest but not in respect of the other, it is said that the damage to the other is "too remote." This results in misapplication and distortion of the remoteness rules, and in subsumption under them of decisions (such as *Bourhill* v. *Young* itself) which properly turn on absence of duty. If it be Denning L.J.'s view [56] that nervous shock cases depend on remoteness, it is curious that he accepts [57] that the test is "foreseeability of injury by shock" but fails to explain how such a test can be reconciled with the "directness" test laid down in *Re Polemis* and by which the Court of Appeal is bound.[58] In this connection it is significant that Denning J. (as he then was) in *Minister of Pensions* v. *Chennell* [59] doubted whether *Re Polemis* could survive certain later decisions [60]; but such a suggestion was dissented from by the Court of Appeal in *Thorogood* v. *Van den Berghs and Jurgens* [61] where it

[53] No doubt applying this test, Denning L.J. comes to the conclusion (p. 534) that the taxicab driver owed a duty of care to the mother, although she was not herself in any personal danger. Nevertheless, in his view the driver "cannot reasonably be expected to have foreseen that his backing would terrify a mother 70 yards away" (p. 535). It would be an interesting task to attempt to reconcile these two propositions.

[54] [1951] A.C. 850.

[55] At p. 533.

[56] As appears from the quoted passages and from p. 533, last para.

[57] *Infra*, note 63.

[58] See *Thorogood* v. *Van den Berghs & Jurgens* [1952] 1 All E.R. 682 (C.A.).

[59] [1946] 2 All E.R. 719.

[60] The *Palsgraf* case (1928) 248 N.Y. 339; *Bourhill* v. *Young* [1943] A.C. 92; *Aldham* v. *U. D.* [1940] 1 K.B. 507; *Woods* v. *Duncan* [1946] A.C. 401.

[61] *Supra*, note 58.

was pointed out [62] that such decisions as *Donoghue* v. *Stevenson* and *Bourhill* v. *Young* depended upon the existence of a duty of care. This, of course, is a question prior to and distinct from that of remoteness of damage.

Denning L.J. himself appears to appreciate that this analysis has its difficulties,[63] and in the next paragraph of his judgment he sets out a different view [64]:

> "A different result is reached by viewing the driver's duty differently. Instead of saying simply that his duty is to drive with reasonable care, you say that his duty is to avoid injury which he can reasonably foresee, or rather, to use reasonable care to avoid it. Then you draw a distinction between physical injury and emotional injury, and impose a different duty on him in regard to each kind of injury, with the inevitable result that you are driven to say that there are two different torts—one tort when he can foresee physical injury, and another tort when he can see emotional injury. I do not think that that is right. There is one wrong only, the wrong of negligence. I know that damage to person and damage to property are for historical reasons regarded as different torts; but that does not apply to physical injury and emotional injury. Lord Wright clearly treated impact and shock as one cause of action when he said in *Bourhill* v. *Young*: 'The man who negligently allows a horse to bolt, or a car to run at large down a steep street, or a savage beast to escape is committing a breach of duty towards every person who comes within the reach of foreseeable danger, whether by impact or shock.'"

This different view, here rejected by Denning L.J., is precisely that advocated in this article. No authority is cited in favour of its rejection save the dictum of Lord Wright, which, when read in its context, appears merely to illustrate the principle that whatever the cause of action (whether in the particular instance it is by reason of impact or by reason of shock) there must be a breach of a duty of care owed to the plaintiff. The dictum cannot be read as a considered opinion designed to prejudice the question which Denning L.J. is discussing, for although it speaks of the commission of *a* breach of duty it does not purport to compass a fact-situation in which damage to more than one interest has occurred. Moreover, Lord Wright's present view runs counter to such an interpretation of his earlier words.[65]

So far as the impact of *King* v. *Phillips* upon an interest theory of negligence is concerned we may conclude, with respect, that

[62] By Asquith L.J. at p. 692, in a judgment concurred in by Cohen and Birkett L.JJ.

[63] See at p. 534, where he says: "Howsoever that may be, whether the exception for shock be based on want of duty or on remoteness, there can be no doubt since *Hay or Bourhill* v. *Young* that the test of liability for shock is foreseeability of injury by shock."

[64] At p. 533.

[65] See his article in 14 M.L.R. at pp. 398 and 400.

the two members of the Court of Appeal who dealt with matters of principle adopted an approach which is radically unsound and which fails to assist the development of this branch of the law along a rational path.

The analysis which we have pursued when considering injury to body-safety, chattel-safety, and mind-safety interests may be employed whatever interests are in issue. In fact, however, the law of negligence does not significantly cast its protection outside those interests we have already considered. A line of cases [66] indicates an important borderline. As a general rule there is no duty of care in respect of damage to a purely pecuniary interest of the plaintiff, although it appears that this rule may not be invariable.[67] One common exception to it is of frequent occurrence. In accident cases, damages sounding in negligence are commonly awarded to co-plaintiffs who do not allege damage to consortium, who may themselves have been in no way injured or endangered, and whose sole claim rests upon their having incurred medical or visiting expenses in respect of the injured plaintiff. But in so far as such purely pecuniary interests may give rise to a duty of care, the principle that such duty must, but need only, involve foresight of damage to that specific interest should be applied. The interest protected, however, must be pecuniary in its own nature. Damage to any interest involves in a sense pecuniary loss, since the value of the thing damaged has been diminished. Other than intrinsic loss may also be taken into account in such cases, as where a profit-earning chattel is involved. Such loss is not for our purposes damage to a "pecuniary interest," however; there is only one duty of care, one breach, and one tort. The problem here is one of evaluation, not one of duty nor even perhaps of remoteness. This appears from Lord Wright's speech (concurred in by the other Lords) in *Liesbosch* v. *Edison*,[68] where he says [69]:

[66] Principally *Simpson* v. *Thomson* (1877) 3 App.Cas. 279, *per* Lord Penzance; *Cattle* v. *Stockton Waterworks* (1875) L.R. 10 Q.B. 453; and *Remorquage à Hélice* v. *Bennetts* [1911] 1 K.B. 243.

[67] See *Morrison S.S.* v. *Greystoke Castle* [1947] A.C. 265 *per* Lord Roche (at p. 280) and Lord Porter (at p. 296), discussed by Prof. Lawson in 22 Tulane Bar Rev. 111, and in his "Negligence in the Civil Law" at pp. 29–36.

[68] [1933] A.C. 449. In so far as it decides that the appellants' impecuniosity was irrelevant this case is one of peculiar difficulty. This part of the decision may perhaps be rationalised by regarding losses flowing from the impecuniosity as damage to a purely pecuniary interest (in respect of which the respondents would owe no duty) and by regarding those losses compensated for as an evaluation of damage to a physical interest. Lord Wright himself clearly regarded this aspect of the decision as turning upon a distinction between the interests of the appellants which were affected (see note 12, *supra*) although he applied the distinction in the context of remoteness. *Cf.* Prof. Lawson in "Negligence in the Civil Law" at p. 62: "It may be that the only rational way to explain [*Liesbosch*] is to say that although a defendant must pay for all the physical damage directly caused by his wrongful conduct, he can be made to pay for pecuniary damage only to the extent of what he ought as a reasonable man to have foreseen." This is also the view of Tilley, *op. cit.*, note 3, *supra*.

[69] At pp. 463–4.

> "The true rule seems to be that the measure of damages in such cases is the value of the ship to her owner as a going concern at the time and place of the loss. In assessing that value regard must naturally be had to her pending engagements, either profitable or the reverse. The rule, however, obviously requires some care in its application; the figure of damage is to represent the crystallised value of the vessel as a profit-earning machine, not in the abstract but in view of the actual circumstances." [70]

Similarly, personal injury cases involve for our purpose injury to the body-safety interest only, although such injuries are evaluated perforce in terms of money. Even where loss of wages is concerned there is no damage to a pecuniary interest proper. The problem is one of evaluation, of assessing in terms of money the damage to the plaintiff "as a profit-earning machine." [71] Any inelegance in this conclusion stems solely from the fact that for the purpose of awarding damages at all the law must necessarily adopt the premise that life and limb have a monetary value.[72] A true "double-interest" problem is only presented where the pecuniary loss is not an ordinary loss but results, for example, from the fact that his physical injury has prevented the plaintiff from concluding an exceptionally remunerative contract.[73] Such loss would fall outside the principle of *Liesbosch* v. *Edison* and the rule of evaluation and would constitute damage to an independent interest, in respect of which there would be required an independent duty and therefore foresight of at least some damage. As the authorities stand, it is unlikely that the law recognises the existence of a general duty to foresee such purely pecuniary damage.[74] If this is so, even if in fact such damage were foreseeable by the defendant, the plaintiff could not recover in respect of it. If once, however, such a duty should be recognised it is submitted that the test of its existence should be foresight of harm of the exceptional pecuniary kind alleged. Of course, in practice in such a case there is nearly always foresight also of physical damage to the plaintiff; it is for this reason that the problem is so often treated as one of remoteness of damage. It is possible, however, to imagine cases in which this factor is absent, so that the matter then emerges in its true light as one of duty or no duty. Thus, A has an important appointment in Town which will almost certainly result in a lucrative

[70] See also *S.S. Morrison* (note 67, *supra*) *per* Lord Simonds at p. 308.

[71] This formula would include also the *damnum emergens* of Roman law (J.Inst. 4.3.10).

[72] An incidental consequence of this approach is that the familiar figure of the shabby millionaire, who walks the street with such singular misfortune, is removed from the *dramatis personae* of those who support the remoteness rule in *Re Polemis*. The problem he presents is not one of remoteness, but of evaluation.

[73] *Cf.* the *lucrum cessans* of Roman law (J.Inst. 4.3.10).

[74] See Salmond, *Torts*, 11th ed., pp. 161–2, and add to the authorities there cited *Hoey* v. *Felton* (1861) 11 C.B.(N.S.) 142, 142 E.R. 749 (a case of false imprisonment).

business deal. He plans to drive in by car. As his chauffeur is driving a hired car to A's house to call for him B negligently collides with it, so that the chauffeur is late meeting A and A misses the appointment and the deal. It is submitted that facts of this type depend for their elucidation upon whether B ought reasonably to have foreseen damage to A of a purely pecuniary [75] nature. In the case supposed, without more, it is evident that he ought not. A nice problem is raised, however, if B is credited with prior knowledge of all A's arrangements. In either case, B cannot reasonably foresee injury to any other interest of A, and hence the sole question is, whether there was foresight of injury to A's purely pecuniary interest. This question, properly characterised, is one of duty and not one of remoteness of damage.

A fundamental question lies yet unanswered. Upon what principle is the distinction to be drawn, for this purpose, between one interest and another? It must be acknowledged at once that any distinction will be arbitrary in the sense that considerations of formal logic will not influence it.[76] The concept of interests is but a means to an end; that end is the attainment of the most just result compatible with the rule in *Re Polemis* on the one hand and with the claims of expediency and practicability on the other. Ideal justice would seem to require that one interest be marked off from another whenever injustice would result from treating a duty of care in respect of the one as if it was accompanied by a duty of care in respect of the other. In practice, more definite lines must be drawn. It is suggested that good working results can be obtained if the categories of interest are drawn somewhat broadly, as follows: (1) freedom from physical bodily injury [77]; (2) freedom from physical injury to chattels; (3) freedom from physical injury to land; (4) freedom from nervous shock; (5) freedom from injury to servitium; (6) freedom from injury to consortium; (7) freedom from purely pecuniary damage.[78] It is not advocated that any attempt be made to subdivide these categories, so that, for example, a person be deemed to have a different interest in his watch from in his motor-car. It is possible that in a minority of cases such subdivision would lead to a more perfect result, but it cannot be referred to any intelligible principle and would lead ultimately to a requirement of foreseeability of the very kind of damage which in fact occurred. This would be incompatible with *Re Polemis*, the correctness of which we have accepted. The interests we have listed above may of course be added to in due time as the expansion

[75] *i.e.*, over and above such damage to A's normal profit-making capacity as is allowed for by the rule in the *Liesbosch* case.

[76] Logic plays but a subsidiary part in the evolution of legal rules. See on this topic Stone, *op. cit.*, pp. 137 *et seq.*

[77] Including loss of expectation of life, which is merely a type of physical personal injury and not damage to an independent interest: see *Derrick* v. *Williams* (*supra*, note 31).

[78] The list does not purport to be exhaustive.

of the law of negligence demands. Nor should there be any difficulty in practice in making the distinction between them. We seem to have arrived at a compromise between the theory which requires foreseeability as a criterion both of duty and of remoteness, and the theory which regards all direct damage as actionable provided some of damage was foreseeable.

E. Anthony Machin.*

* Of Lincoln's Inn and the South-Eastern Circuit, Barrister-at-Law.

DEVIATIONS FROM THE TERMS OF A TRUST

THE limits of the jurisdiction of the courts to sanction deviations from the strict terms of a trust have now been fixed by the House of Lords in *Chapman* v. *Chapman*.[1] This decision makes it clear that the court does not possess plenary powers to alter a trust because alteration is thought to be advantageous to beneficiaries who are infants or not yet born, even though, paradoxically, such beneficiaries could of their own volition and without the assistance of the court have made the desired alteration, had they been *in esse* and *sui juris*. A brief review of the attitude of equity towards the rights of beneficiaries in relation to trusts will show that this paradox is nothing new, and will at the same time focus attention on the underlying diversities which are reflected in the recent decisions.

Equity has never conceded that the *cestui que trust* is the owner of the trust property for all purposes. It began by saying that he had nothing more than a right to compel the trustee to perform the trust according to its terms or to make good any loss caused by his failure to perform it, and this right ultimately became enforceable against everyone except the bona fide purchaser for value of the legal estate.[2]

Gradually, however, the personal right of the *cestui que trust* to compel performance of the trust expanded into an interest in the trust property itself at any rate for certain specific purposes. This development is exemplified in three ways:

First, the rule in SAUNDERS *v.* VAUTIER [3]

> A *cestui que trust* who is *sui juris* and absolutely entitled can put an end to a trust for accumulation which is directed for his exclusive benefit, and call for an immediate transfer. He can in effect say "the fund is mine: give it to me now." The basis of this is obviously something more than a right to compel the carrying out of the settlor's directions.

Secondly, the rule in HALLETT'S ESTATE [4]

> The *cestui que trust* has a right in the trust property to this extent that he can follow it as a *res* into the hands of the trustee himself or anyone who receives it from the trustee otherwise than by purchase for value without notice. This is additional to the personal right which he has against the

[1] [1954] 2 W.L.R. 723; and see *Re Downshire*, *Re Blackwell* and *Re Chapman* (C.A.) reported together [1953] 2 W.L.R. 94.
[2] See Maitland, *Equity* (ed. Brunyate), Lectures IX. X, and XI.
[3] (1841) 4 Beav. 115; affd. Cr. & Ph. 240; 10 L.J.Ch. 354.
[4] (1880) 13 Ch.D. 696; see also *Re Diplock* [1948] 1 Ch. 465.

same class of persons. But in the event of the bankruptcy of the trustee or other person liable, the *cestui que trust* can only prove in the bankruptcy along with the other creditors in respect of his personal claim. On the other hand, his right in the trust property itself as a *res* is a proprietary one which enjoys priority over creditors' personal claims. This illustrates the duality of rights which a beneficiary has in relation to trust property.

Thirdly, the rule in Baker *v.* Archer-Shee [5]

For certain income tax purposes the *cestui que trust* is regarded as having more than a right to compel performance of the trust; he has a proprietary interest in the fund which renders him liable to income tax in certain circumstances.

It is but seldom that the personal right of the *cestui que trust* clashes with his real right, for the latter merely gives rise in certain cases to an additional remedy which does not impair the efficacy of the former. There are occasions, however, on which the underlying diversities between the two have to be reconciled. Thus in *Re Brockbank* [6] X and Y were trustees of a fund of which A was tenant for life and B the remainderman. Both A and B were *sui juris* and under no disability. Y wished to retire from the trust and X desired to appoint Z in his place. A and B, however, wished T to be the new trustee. Now it was quite clear that A and B, as the beneficiaries collectively entitled, could put an end to the existing trust, and resettle the property on a new trust, of which, as settlors, they could appoint the trustees. The disadvantage was that the resettlement would attract stamp duty, and might bring about a state of affairs which might result in a loss of exemption from estate duty. On the other hand, it was equally clear that the legislature had followed the practice of settlors in entrusting to the continuing or surviving trustees of the settlement the power to appoint new trustees, and that the reason for this practice was the promotion of harmony between the trustees. The conflict in *Re Brockbank* was resolved in favour of the trustees, though it was conceded that the beneficiaries could attain their wishes, but at some expense and possible disadvantage to themselves. So too in *Re Power* [7] the duty of trustees to invest trust money was held to outweigh the advantage to the beneficiaries in having a house purchased for their occupation, since such a purchase would not be an investment, in view of the fact that a large and not readily realisable premium would be paid for vacant possession. Further in *Wilkins* v. *Hogg* [8] trustees were held to be protected from liability for breach of trust by the express terms of the settlement, for it

[5] [1927] A.C. 844; see also *Archer-Shee* v. *Garland* [1931] A.C. 212.
[6] [1948] Ch. 206; and see for another illustration *Re George Wichelow Ltd.* [1954] 1 W.L.R. 5.
[7] [1947] Ch. 572.
[8] (1861) 30 L.J.Ch. 492.

was competent to the settlor to limit the rights of the beneficiaries. On the other hand in *Re Wynn*[9] a clause empowering the trustees finally to determine all matters arising in the administration and execution of the trusts of a will was held void on the ground *inter alia* of repugnancy to the interests of the beneficiaries. Nothing definite and conclusive emerges from this brief survey, but it does reveal a divergence of attitude towards the conflict between the interests of the beneficiaries and the wishes of the settlor as expressed in the terms of the settlement. The question is "which is paramount—the advantage of the beneficiaries or the terms of the trust?"

To this question the answer now is that "it is the function of the court to execute a trust, to see that the trustees do their duty and to protect them if they do it, to direct them if they are in doubt, and, if they do wrong, to penalise them. It is not the function of the court to alter a trust because alteration is thought to be advantageous to an infant beneficiary."[10]

The rule is well supported by authority,[11] but it is not absolute and it has been qualified from time to time by exceptions created both by the court and by the legislature. Some of these exceptions relate to acts done by the trustees in regard to the trust property in the management or administration of the trust, while others go beyond this and confer a limited power to remould the beneficial interests when this is to the advantage of the beneficiaries.

Exceptions Relating to Acts Done in Management or Administration of Trust

A. *Salvage*[12]

This group of cases involved the alienation of infants' property and established the proposition that the court could sanction a mortgage or sale of part of an infant's beneficial interest for the benefit of the part retained in cases of absolute necessity. Thus in *Re Jackson*[13] Kay J. directed an inquiry concerning what repairs

[9] [1952] 1 T.L.R. 278.

[10] [1954] 2 W.L.R. 723, 727 (Lord Simonds L.C.).

[11] See Romer L.J. in *Re New* [1901] 2 Ch. 534; North J. in *Re Crawshay* (1888) 60 L.T. 357, 359; Buckley J. in *Re Morrison* [1901] 1 Ch. 701, 707; Farwell J. in *Re Walker* [1901] 1 Ch. 879; Langdale M.R. in *Johnstone* v. *Baber* (1845) 8 Beav. 233; Chitty J. in *Re De Teissier* [1893] 1 Ch. 153, 163; Lopes L.J. in *Re Montagu* [1897] 2 Ch. 8, 11; Kekewich J. in *Conway* v. *Fenton*, 40 Ch.D. 512, 516 and in *Re Tollemache* [1903] 1 Ch. 457, 462: on appeal [1903] 1 Ch. 955; *cf.* Lord Northington in *Inwood* v. *Twyne* (1762) 2 Eden 148, 152; Turner L.J. in *Brooke* v. *Mostyn* (1864) 2 De G.J. & S. 415; Lord MacNaghten in *Att.-Gen.* v. *Ailesbury* (1887) 12 App.Cas. 672, 688; Lord Bathurst in *Ex p. Grimstone* (1772) Amb. 706, 708; Denning L.J. in *Re Downshire* [1953] 2 W.L.R. 94, 131–140.

[12] See Keeton, *Law of Trusts*, 6th ed., p. 264; Underhill, *Law of Trusts and Trustees*, 10th ed., p. 258.

[13] 21 Ch.D. 786; see also *Hibbert* v. *Cooke*, 1 S. & S. 552; *Dent* v. *Dent*, 30 Beav. 363; *Daly* v. *Daly*, 2 J. & Lat. 752; *Peto* v. *Gardner*, 2 Y. & C. Ch. 312; *Calvet* v. *Godfrey*, 6 Beav. 97; *Dunlop* v. *Webster* (1878) S. 363; *Frith* v. *Cameron*, 12 Eq. 169.

were absolutely necessary, and commented that the jurisdiction to mortgage the infant's estate to carry out the repairs should be jealously exercised. In *Conway* v. *Fenton* [14] Kekewich J. sanctioned a proposal for the maintenance of the trust property where an infant was entitled in remainder and it was shown by evidence that the expenditure was necessary and to his advantage. This case was distinguished in *Re De Teissier* [15] where Chitty J. made the following pertinent observations: "The court does not possess plenary powers over the real estate of infants. The popular notion on the subject is an error. The court of equity has never assumed to dispose, just as it thinks fit, of an infant's estate. At one time it was thought that the court could order the sale of an infant's estate, because it was for the benefit of the infant. That notion was exploded as long ago as *Calvet* v. *Godfrey*.[16] Then the Court of Appeal has laid it down that in the case of an infant, entitled to real estate absolutely in possession, the court has no jurisdiction to change that real estate for the purpose of advancing the infant and that, too, in a case when it was eminently desirable that such an advance should be made if it could be made. That was the case of *Re Swanston*.[17] I mention this, not by way of exhausting the matter, but for the purpose of showing that the jurisdiction the court exercises over the real estate of infants is not to dispose of it at its will and pleasure, but practically it is to administer the trust." And in *Re Montagu* [18] the Court of Appeal refused to sanction a scheme which was proposed on the ground that it was vastly for the benefit of the persons interested that it should do so. "That is not enough," said Lopes L.J. "If the building were falling down it would be a case of actual salvage and would stand differently." [19]

B. *Emergency*

This exception can be regarded as an extension of the salvage cases. The salvage cases required proof of absolute necessity. The principle of the emergency cases is somewhat wider and is thus stated by Romer L.J. in *Re New* [20]: "In the management of a trust estate . . . it not infrequently happens that some peculiar state of circumstances arises for which provision is not expressly made by the trust instrument, and which renders it most desirable, and it may be even essential, for the benefit of the estate and in the interest of all the *cestuis que trust*, that certain acts should be done by the trustees which in ordinary circumstances they would have no power to do. In a case of this kind, which may reasonably

[14] 40 Ch.D. 512.
[15] [1893] 1 Ch. 153, 163; see also *Neill* v. *Neill* [1904] 1 Ir.R. 513.
[16] 6 Beav. 97.
[17] 31 S.J. 427; *cf.* Kekewich J. in *Re Tollemache* [1903] 1 Ch. 457.
[18] [1897] 2 Ch. 8.
[19] *Ibid.*, 11.
[20] [1901] 2 Ch. 534, 544.

be supposed to be one not foreseen or anticipated by the author of the trust, where the trustees are embarrassed by the emergency that has arisen and the duty cast upon them to do what is best for the estate, and the consent of all the beneficiaries cannot be obtained by reason of some of them not being *sui juris* or in existence, then it may be right for the court, and the court would in a proper case have jurisdiction, to sanction on behalf of all concerned such acts on behalf of the trustees as we have above referred to." In this case the Court of Appeal authorised the trustees of shares in a company to concur in a scheme whereby the shares were exchanged for more realisable shares and debentures in a new company, in which the trustees had no power to invest under the terms of the trust instrument. But the court put them on an undertaking to apply for leave to retain the shares and debentures in the new company if they desired to do so beyond a year. The limits of the jurisdiction were emphasised in *Re Tollemache* [21] where Kekewich J. refused to authorise the trustees to acquire a mortgage of the interests of the tenant for life (notwithstanding that it was shown to be to the advantage of the beneficiaries), and stated that [22] " all the cases of refusal [to exercise jurisdiction] may be grouped under one of two classes. Either, notwithstanding the advantage actual and prospective of what is proposed to be done, there is no urgency for it, and the existing state of things may without great mischief be allowed to remain, or the terms on which the advantage can be gained are such that the court would by accepting them create a new trust in lieu of that which it is administering." The Court of Appeal affirmed his decision, Romer L.J. remarking [23]: " I agree. *Re New* [24] shows how far the court will go, and beyond what point it will not go."

C. *Expediency*—section 57 of the Trustee Act, 1925

Section 57 of the Trustee Act, 1925, rested the jurisdiction on expediency—a basis which it is conceived is wider than that of salvage or emergency. The section provides: " Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction, is in the opinion of the court *expedient*, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the court may think fit and may direct in what manner any money authorised to be expended, and the costs of

[21] [1903] 1 Ch. 457.
[22] *Ibid.*, 462.
[23] [1903] 1 Ch. 956.
[24] [1901] 2 Ch. 534.

any transaction, are to be paid or borne as between capital and income."

The section envisages, on analysis, (i) an act unauthorised by a trust instrument, (ii) to be effected by the trustees thereof, (iii) in the management or administration of the trust property, (iv) which the court will empower them to perform, (v) if in its opinion the act is expedient. The object of the section is to enable the court to authorise specific dealings with the trust property which it might not have been able to do on the basis of salvage or emergency, but it was no part of the legislative aim to disturb the rule that the court will not rewrite a trust.[25]

This is an overriding section, the provisions of which are to be read into every settlement.[26] The powers of the court are limited only by expediency, though the proposed transaction must be for the benefit not of one beneficiary but of the whole trust.[27] The power has been used to authorise the sale of chattels settled on trusts which prevent sale,[28] the sale of land where a consent requisite to sale has been refused,[29] the partitioning of land where there was no power to partition,[30] and the blending of two charitable funds into one.[31] But where a fund is settled on X for life upon protective trusts, the court has no power to authorise the trustees to release part of the fund to X on terms that the release shall not cause a forfeiture, unless some provision is made for compensating the objects of the discretionary trusts which would arise should X subsequently incur a forfeiture.[32] Nor can the trustees be authorised to accept a surrender of X's protected life interest, and to release the fund from the discretionary trusts which would then arise.[33]

D. *Conversion*

This group of cases arose out of the differences that used to exist between real and personal property both in regard to succession on intestacy (realty going to the heirs-at-law and personalty to the next-of-kin) and also to the power of testamentary disposition (personalty could be disposed of by will at the age of seventeen, but realty not till twenty-one). The general rule was that trustees for an infant could not change the nature of an estate from realty

25 *Re Downshire* [1953] 2 W.L.R. 94, 112–113.
26 *Re Mair* [1935] Ch. 562.
27 *Re Craven's Estate No. 2* [1937] 1 Ch. 431.
28 *Re Hope's Will Trust* [1929] 2 Ch. 136.
29 *Re Beale's Settlement Trusts* [1932] 2 Ch. 15.
30 *Re Thomas* [1930] 1 Ch. 194.
31 *Re Harvey* [1941] 3 All E.R. 284.
32 *Re Downshire* [1953] 2 W.L.R. 94, 113–114; *cf. Re Salting* [1932] 2 Ch. 57; *Re Mair* [1935] Ch. 562.
33 *Re Blackwell* [1953] 2 W.L.R. 94, 129–131; for other cases on s. 57 see *Municipal and General Securities Co. Ltd. v. Lloyds Bank Ltd.* [1950] Ch. 212; *Re Pratt* [1943] 2 All E.R. 375; *Re Basden* [1943] 2 All E.R. 11.

to personalty, or vice versa, because that would prejudice succession and also the power of disposition.[34] But the rule grew up that the court itself could sanction a change where it was for the benefit of the infant,[35] though the court would usually insert in its order a proviso that the estate should remain notionally unchanged in equity during the minority of the infant.[36] The same principle was applied in the case of lunatics.[37]

Three observations should be made on this group of cases. First they antedate the period from which investments were authorised by statute and the trust instrument, and in that situation it is not surprising that the court would in a proper case override the duty of the trustee to preserve the trust property in the state in which it had come to him. Secondly these cases form part of a wider group giving rise to the equitable doctrine of conversion, the underlying principle of which was to prevent a trustee from altering the rights of beneficiaries, whether *sui juris* or not, by committing a breach of trust. It is quite a different thing to argue from them that they confer a power to commit a breach of trust where it is in the interest of the beneficiaries that they should do so. And thirdly it is clear that they do not confer a power to rewrite a trust, but merely authorise specific dealings in limited circumstances with the trust property.[38]

Exceptions Relating to the Remoulding of the Beneficial Interests

A. *Maintenance*

Where a settlor has made a provision for a family but has postponed the enjoyment, either for a particular purpose or generally for the increase of the estate, it is assumed that he did not intend that the children should be left unprovided for, or in a state of such moderate means that they should not be educated properly for the position which he intended them to have, and the court has accordingly broken in upon the accumulation and provided maintenance for the children.[39] The exercise of this jurisdiction resulted in an alteration of beneficial interests since income was applied in maintaining beneficiaries notwithstanding the fact that the settlor had directed that it should be accumulated or applied in reduction of incumbrances. The jurisdiction is not

[34] See *Witter* v. *Witter* (1730) 3 P.Wms. 99.
[35] *Earl of Winchelsea* v. *Norcliffe* (1686) 1 Vern. 435; *Pierson* v. *Shore* (1739) 1 Atk. 480; *Inwood* v. *Twyne* (1762) Amb. 417.
[36] *Bridges* v. *Bridges* (1752) noted (1887) 12 App.Cas. 693; *Ashburton* v. *Ashburton* (1801) 6 Ves. 6; *Ex p. Phillips* (1812) 19 Ves. 123.
[37] *Ex p. Annandale* (1749) Amb. 81; *Ex p. Grimstone* (1772) Amb. 706; *Att.-Gen.* v. *Ailesbury* (1887) 12 App.Cas. 672.
[38] [1954] 2 W.L.R. 723, 735 (Lord Morton).
[39] *Havelock* v. *Havelock* (1880) 17 Ch.D. 807; *Re Collins* (1886) 32 Ch.D. 229; *Revel* v. *Watkinson* (1748) 1 Ves.Sen. 93; *Re Walker* [1901] 1 Ch. 879; *Greenwell* v. *Greenwell* (1800) 5 Ves. 194; *Cavendish* v. *Mercier* (1776) 5 Ves. 195n; *Errat* v. *Barlow* (1807) 14 Ves. 202.

confined to cases of emergency or necessity, for maintenance has been allowed to a father when the mother had ample means of her own to bring up the children.[40] On the other hand it does not rest merely on the benefit of the children, but can be explained either on the basis of presumed intent, as Pearson J. thought in *Re Collins*,[41] or on the construction of the will as Farwell J. said in *Re Walker*.[42]

B. *Compromise*

It has long been clear that where the rights of the beneficiaries under a trust are the subject of doubt or dispute, the court has jurisdiction on behalf of all interested parties, whether adult, infant or unborn, to sanction a compromise by substituting certainty for doubt.[43] The issue in *Re Downshire*,[44] *Re Blackwell*[45] and *Re Chapman*[46] before the Court of Appeal, and in the last-named case[47] before the House of Lords, was whether the court had jurisdiction to do the same with regard to rights which were admittedly not in dispute.

In *Re Downshire*[48] X was the tenant for life upon protective trusts of a settlement, comprising land and personalty, with power to charge the land for jointure and portions. Y was entitled to a life interest in remainder with similar powers to charge for jointure and portions, and Z was entitled absolutely in remainder but his interest was liable to be divested if a son was subsequently born to X. In the event of X incurring a forfeiture, a discretionary trust would arise during the remainder of his life for the benefit of himself, his wife, children and remoter issue. X was a bachelor aged fifty-eight years. The court was asked to sanction a scheme whereby both X and Y should surrender their respective life interests in the personalty in order to accelerate the interest of Z, and at the same time release their powers of charging the land in consideration of a cash payment of £100,000 each. In order to safeguard the objects of the discretionary trusts in case X married and had issue, a single premium policy was to be taken out for £49,000 in the event of a son being born to X, and £20,000 of the personalty was to be retained by the trustees for the same effect and purpose. The remainder of the personalty was to be held on trust for Z subject to being divested in favour of a son of X if thereafter born.

In *Re Blackwell*[47] the settlor who was also tenant for life under a protective trust sought the sanction of the court for the surrender

40 See *Haley* v. *Bannister* (1820) 4 Madd. 275.
41 (1886) 32 Ch.D. 229.
42 [1901] 1 Ch. 879; *cf.* Denning L.J. in *Re Downshire* [1953] 2 W.L.R. 94, 134.
43 *Brooke* v. *Mostyn* (1864) 2 De G.J. & S. 415.
44 [1953] 2 W.L.R. 94.
45 [1954] 2 W.L.R. 723.
46 [1953] 2 W.L.R. 94, 118–123.
47 *Ibid.*, 129–131.

of his interest in half of the settled fund so as to accelerate the interests in reversion expectant on his death, but on terms that his interest in the other half of the fund should not be forfeited. Provision would be made to cover the interests of a possible second wife and remoter issue which might have been defeated by the surrender.

In *Re Chapman*[48] X and Y created trusts for the benefit of the children of their son R, and inserted in the trusts a provision for unequal or selective maintenance until they attained the age of twenty-five. By another settlement made on the occasion of the marriage of another son, N, Y settled property in the first place on trust for N, his wife, and children, and in the event of failure of these trusts on trust for the children of R on substantially the same terms as those in the previous settlements. The trustees of the three settlements proposed to transfer the trust funds to trustees of a new settlement on similar trusts but with the provision for unequal or selective maintenance omitted, and they asked the court to sanction the proposal on behalf of the infant children of R.

In each of the three cases the object of the proposed scheme was the possible reduction of future claims for estate duty. The Court of Appeal decided that this would not prevent the exercise of the jurisdiction[49] provided it could be shown that the case came within one of the recognised exceptions, and the House of Lords expressed no dissent from this. The Court of Appeal was unanimous in approving the schemes in *Re Downshire* and *Re Blackwell*. Sir Raymond Evershed M.R. and Romer L.J. rested it on the authority of the court to approve compromises, though, the rights of the beneficiaries not being in dispute, they gave an extended meaning to the word "compromise" which they thought was warranted by the decision in *Re Trenchard*.[50] In that case the

[48] *Ibid.*, 123–129.

[49] *Re C.W.M.*, 1941, No. 2396; [1951] 2 K.B. 714.

[50] [1902] 1 Ch. 378; see also *Re Wells* [1903] 1 Ch. 848. In that case subject to annuities payable to X and Y the testator's estate was divisible equally among the children of X and Y who survived the last annuitant and attained majority. X and Y had seven children who at the date of the action had all attained majority. X and Y were the testator's heiresses and next-of-kin, and being aged fifty-seven and fifty-eight respectively were deemed to be past child-bearing. Some of the children of X and Y had settled their equitable contingent interests upon trusts under which interests were conferred upon the grand-children and possible grand-children of X and Y. The proposal was that subject to certain payments being made to X and Y, the trust fund should be immediately divided among the seven children of X and Y. Farwell J. sanctioned the proposal on behalf of the infant grand-children and possible grand-children. Sir Raymond Evershed M.R. and Romer L.J. regarded this as an example of a compromise in a *Re Trenchard* sense, or alternatively as a case in which there was no remoulding of the trusts, but rather an alteration of the trust property itself. Thus the children of X and Y were entitled to a share of a fund contingently on surviving X and Y. They settled their equitable contingent interests on existing and future grand-children of X and Y. They then exchanged their equitable contingent interests for vested interests in a definite part of the fund: the interests of the grand-children were not rearranged: it was the property which was

tenant for life was entitled to reside rent free in premises worth £350 per annum. Failure to reside would involve forfeiture of her life interest unless the failure was occasioned by the sale or lease of the premises under her statutory powers. Both her continued residence and a sale would have been equally disadvantageous to the estate as a whole, which it was desired should be developed under a building scheme. The trustees accordingly proposed that she should depart from the premises and lose the equivalent of £350 per year in return for a compensatory payment of £275 per year in cash, and the court sanctioned this proposal on behalf of the infant remainderman. This was not a compromise in the strict sense of the settlement of a disputed right, since there was no dispute about the validity of the condition of residence. But Sir Raymond Evershed M.R. and Romer L.J. regarded it as a compromise in a loose sense which the court could sanction since it involved the giving up by one party of something uncertain and liable to terminate in return for something definite and not so liable. Denning L.J. rested it on the authority of the court to exercise a jurisdiction which was limited only by two conditions, first the consent of interested adults, and secondly benefit to interested parties who were infants or not yet *in esse*.[51]

Sir Raymond Evershed M.R. and Romer L.J. refused to sanction the scheme in *Re Chapman* on the ground that the court was not there dealing with compromises in the broad sense between tenants for life, on the one hand, and remaindermen, on the other hand, but were being asked to vary the rights *inter se* of a class which the settlor had directed should be treated in a particular way.[52] Denning L.J. dissented on the ground that no limit was to be placed upon the power of the court to approve agreements between beneficiaries about their beneficial interests whereby those interests were distributed between them differently from the directions of the settlor, provided that the agreement was approved by those who were *sui juris* and to the advantage of those who were not.

The trustees appealed to the House of Lords which was unanimous in dismissing the appeal. Their Lordships were likewise unanimous in rejecting the wide jurisdiction vouchsafed by Denning L.J., though Lord Oaksey [53] only agreed with the greatest hesitation. There was, however, some difference of opinion on the extent of the jurisdiction in respect of compromises. Lord Simonds L.C. [54] thought the court should not give to the term "compromise" a

being held on trust for them that had undergone a change. See [1953] 2 W.L.R. 94, 107–8. Lord Morton in *Chapman* v. *Chapman* adopted the latter explanation: [1954] 2 W.L.R. 723, 745; *cf.* Denning L.J. [1953] 2 W.L.R. 94, 135.

51 [1953] 2 W.L.R. 94, 131.

52 *Ibid.*, 128; see also [1954] 2 W.L.R. 723, 754 (Lord Cohen).

53 [1954] 2 W.L.R. 723, 729.

54 *Ibid.*, 728.

meaning which it did not legitimately bear, and sanction an alteration of trusts where no dispute existed. In his opinion *Re Trenchard* [55] should be regarded as an isolated case in which the court went further than it had hitherto done in giving to the word "compromise" an unnatural meaning and to itself a jurisdiction never before exercised. Lord Morton was of the opinion that Buckley J. in *Re Trenchard* [55] may have stretched the jurisdiction to approve a compromise beyond its proper limits, but thought that the case could be explained on the ground that it was no more than the sanctioning by the court of a purchase by the trustees of the widow's rights [56]; Lord Asquith [57] agreed with Lord Morton. But Lord Cohen [58] was not prepared to overrule, or even to doubt, the authority of *Re Trenchard*.[55] In his opinion it was more than a purchase by the trustees of the widow's beneficial interest, since under the settlement the widow would lose her interest either on remarriage or on failure to reside in the house, whereas under the scheme approved by the court she would lose her interest in the compensatory fund on remarriage only. The scheme therefore involved an alteration of the quality of the beneficial interest of the widow. Further he was of the opinion that a line could be drawn which would confine the "compromise" cases within defined limits and at the same time refute the exercise by the court of an unlimited jurisdiction. The line had been indicated by Sir Raymond Evershed M.R. and Romer L.J in *Re Downshire* [59] and *Re Blackwell*.[60] The court could sanction arrangements proposed between tenants for life on the one hand and remaindermen on the other; but it could not vary the rights of a class *inter se* which the settlor had directed should be treated in a particular way.[61]

The position would, therefore, seem to be as follows: the court can sanction a compromise in the strict sense, where the rights of the beneficiaries are the subject of doubt or dispute. *Re Trenchard* [62] must be regarded either as not having involved a compromise in any wider sense, or alternatively as an isolated and

[55] [1902] 1 Ch. 378.
[56] [1954] 2 W.L.R. 723, 745.
[57] *Ibid.*, 751.
[58] *Ibid.*, 753.
[59] [1953] 2 W.L.R. 94, 118–123.
[60] *Ibid.*, 129–131.
[61] There was also some difference of opinion in the House of Lords concerning the effect of a compromise. Lord Simonds L.C. and Lord Cohen regarded it as involving an alteration of beneficial interests ([1954] 2 W.L.R. 723, 727, 752). Lord Morton considered that it did not have this effect since it could not be predicated what the rights of the beneficiaries were until the court had settled the dispute concerning them ([1954] 2 W.L.R. 723, 740). With respect it is submitted that the view of Lord Cohen is the right one. In these cases the court is not being asked to determine the rights which the settlement confers upon the beneficiaries, but to give practical effect to a rearrangement of those rights on the basis that dispute or doubt exists.
[62] [1902] 1 Ch. 378.

unwarranted extension of the jurisdiction of the courts. The extension of the meaning of compromise beyond its proper limits would result either in conceding the unlimited jurisdiction vouchsafed by Denning L.J. or in confining its scope by reference to distinctions of fact rather than of principle. The first alternative was not supported by authority,[63] and the second was artificial and unattractive. The result is that the authority of *Re Downshire*[64] and *Re Blackwell*[65] fall with that of *Re Trenchard*[66] but the orders made in these cases are probably a sufficient protection to the trustees, and cannot be ignored in the future by the revenue or persons not *sui juris*.[66]

C. *Section 64 of the Settled Land Act, 1925*

Section 64 (1) of the Settled Land Act, 1925, provides that any transaction affecting or concerning the settled land, or any part thereof, or any other land (not being a transaction otherwise authorised by this Act, or by the settlement) which in the opinion of the court would be for the benefit of the settled land, or any part thereof, or the persons interested under the settlement, may, under an order of the court, be effected by a tenant for life, if it is one which could have been validly effected by an absolute owner. "Transaction" is defined by subsection (2) to include "any sale, extinguishment of manorial incidents, exchange, assurance, grant, lease, surrender, reconveyance, release, reservation or other disposition, any purchase or other acquisition, any covenant, contract, or option, and any application of capital money . . . and any compromise or other dealing or arrangement. . . ."

Roxburgh J. in *Re Downshire*[67] thought that the section did nothing more than authorise with the sanction of the court the carrying out of transactions in the nature of practical steps of an administrative character: it did not authorise the remoulding of beneficial interests. Sir Raymond Evershed M.R. and Romer L.J., however, expressed the view that the jurisdiction conferred by the section was more ample, and they were prepared to exercise this jurisdiction to sanction the scheme in *Re Downshire* in so far as it concerned settled land. Their reasons may be summarised as follows[68]: "Transaction" is a word of very wide import, and is defined by the section itself to include "compromise, and any other dealing or other arrangement." Practical steps of an administrative character are provided for by section 71 of the Settled Land Act. Therefore it was improbable that section 64 was meant to act

[63] See the explanation of *Re Trenchard* [1902] 1 Ch. 378, *Re Wells* [1903] 1 Ch. 848, *Re Lucas* [1947] Ch. 558 and *Re Duke of Leeds* [1947] Ch. 525 by Lord Morton at [1954] 2 W.L.R. 723, 744–7.
[64] [1953] 2 W.L.R. 94, 118–23.
[65] *Ibid.*, 129–31.
[66] See Lord Cohen [1954] 2 W.L.R. 723, 754.
[67] *Sub nom. Re D's Settled Estates* [1952] 2 All E.R. 603, 606.
[68] [1953] 2 W.L.R. 94, 116–7.

merely as a supplement to section 71. Nor was the fact that the transaction had to be effected by the tenant for life an indication that a restricted meaning should be given to the word "transaction," since section 75 (2) of the Act permitted the tenant for life to give directions to the trustees with regard to the application of capital moneys. The factors limiting the scope of the section were, first, that the transaction must be for the benefit either of the settled land or of the persons interested under the settlement, though not necessarily of both; secondly it must affect or concern the settled land, or any other land whether settled or not, and whether within or without England; and thirdly when it concerns settled land, it must have an effect which is real and substantial by ordinary commonsense standards as distinct from one which is oblique or remote and merely incidental.

Since no appeal was made from the decision in *Re Downshire* the scope of the section cannot be regarded as having been finally settled, but as Sir Raymond Evershed M.R. and Romer L.J. pointed out the language of section 64 of the Settled Land Act, 1925, is to a material degree dissimilar from that of section 57 of the Trustee Act, 1925, and the dissimilar results are compatible with the natural meaning of the words used in the sections themselves.[69]

D. *Section 53 of the Trustee Act, 1925*

Section 53 of the Trustee Act provides that where an infant is beneficially entitled to *any* property the court may with a view to the *application* of the capital or income thereof for the maintenance, education or *benefit* of the infant make an order appointing a person to convey such property upon such terms as the court may think fit. In *Re Gower's Settlement* [70] the court authorised the mortgage of an infant's entailed interest in remainder for the purpose of providing money for his maintenance so as to bar his issue and subsequent remaindermen as effectively as if he had been of full age and had executed the disentailing assurance himself. Before the Act the court had disclaimed jurisdiction to do this.[71] It may well be that this section is also available to enable the court to raise money out of realty for the advancement of an infant. The section covers *any* property and its object is maintenance, education or benefit, the word "benefit" being wide enough to subsume advancement.[72] If this is so the difficulty felt by Chitty J. in *Re De Teissier* [73] concerning the ability of the court to advance an infant out of realty has been removed and the case of *Re Swanston* [74] is no longer law. It should be observed first, that this

[69] For cases on the section see *Re Scarisbrick* [1944] Ch. 229; *Re Mount Edgcumbe* [1950] Ch. 615; *Re White-Popham* [1936] 1 Ch. 725.
[70] [1934] 1 Ch. 365.
[71] *Re Hambrough* [1909] 2 Ch. 620.
[72] See *Re Livesey* [1953] 1 W.L.R. 1114.
[73] [1893] 1 Ch. 153.
[74] 31 S.J. 427.

section does confer upon the court power to deal with the beneficial interests of infants, and is in this respect complementary to section 57, which confers the power to authorise dealings with the trust property, and secondly that the word "application" would appear to be wide enough to be capable of being interpreted so as to cover the ultimate preservation of the capital from diminution through estate duty.

Can it be that the decision of the House of Lords in *Chapman* v. *Chapman*[75] was *per incuriam*? Perhaps the answer is that section 53 of the Trustee Act, 1925, is of no assistance to unborn persons. The section does not specifically include them, and although the order in *Re Gower's Settlement*[76] would at first sight appear to have affected the interests of possible issue of the infant tenant in tail, the issue themselves had not been given any interest under the settlement. The words used by the settlor were words of limitation and not of purchase.[77]

Thus the paradox remains. The court which by the decision in *Saunders* v. *Vautier*[78] conceded power to adults to do as they wished with their own now withholds its assistance from infant and unborn beneficiaries. The reason may be the tactical one suggested by Lord Morton in *Chapman* v. *Chapman*.[79] The court must avoid the appearance of being a pawn in a game of chess between the beneficiaries and the legislature. If the court sanctions a scheme which would evade the fiscal laws, and the legislature then alters the fiscal laws so as to frustrate the scheme, the court would be in an embarrassing position if the beneficiaries proposed a further scheme, the object of which was a further evasion. No such embarrassment arises in the case of adult beneficiaries, for the court is not asked to set its seal of approval on their schemes: the adults can do it themselves.

Perhaps the balance will be redressed by settlors themselves, for it may be open to them in future settlements to confer power upon their trustees to alter the beneficial interests of the trusts where it is to the advantage of infant and unborn beneficiaries that they should do so, provided that the adult beneficiaries give their consent. Such a power would require careful drafting if it is to avoid the snares of perpetuity and also escape attack on the ground of excessive delegation. But this is poor consolation to the infants in *Chapman* v. *Chapman*.

O. R. MARSHALL.*

[75] [1954] 2 W.L.R. 723.
[76] [1934] 1 Ch. 365.
[77] Other exceptions under this head which are outside the scope of this paper are the *cy-près* jurisdiction of the court in relation to charitable trusts and the statutory jurisdiction of the Divorce division of the High Court to vary ante-nuptial and post-nuptial settlements. See Matrimonial Causes Act, 1950, s. 25.
[78] (1841) 4 Beav. 115; affd. Cr. & Ph. 240; 10 L.J.Ch. 354.
[79] [1954] 2 W.L.R. 723, 749.

* M.A., PH.D., Sub-Dean of the Faculty of Laws and Lecturer in Laws, University College, London.

CRUELTY AND CONSTRUCTIVE DESERTION

In 1951, Lord Merriman expressed the hope that some day a full Court of Appeal would consider anew the whole question of cruelty and constructive desertion.[1] The passage of time has made that need more acute. Divergent and even contradictory statements of the law have multiplied. For instance, in *Dixon* v. *Dixon*[2] Davies J. had to consider whether *Edwards* v. *Edwards*[3] and *Pike* v. *Pike*[4] could be reconciled, and, even more recently, Willmer J. in *Bright* v. *Bright*[5] did not feel able to follow the decision of Davies J. The time is clearly overdue for an authoritative statement of the law either by a full Court of Appeal or the House of Lords.

In the meantime, with great temerity, an attempt will be made here to clarify the points in issue.

There appear to be four matters which are in controversy.

1. In constructive desertion, is it essential to prove an intention to drive the petitioner away?
2. Is conduct falling short of a matrimonial offence sufficient to justify one spouse leaving the other; and in particular is conduct in the nature of cruelty, but falling short of it, sufficient?
3. In cruelty, is it an essential element that the acts constituting cruelty must be "aimed at" the other spouse?
4. Is the question of the respondent's character relevant when considering allegations of cruelty by him or her, and, if so, to what extent?

Constructive desertion: intention to drive away

It is well known that the person who leaves the matrimonial home is not necessarily the deserter. Facts may be proved showing that the home has been broken up by the party who stays behind. If, of course, it can be shown that this spouse intended to drive the other away, no difficulty arises; but the intention of this spouse is not always clear. Sometimes the husband wishes his wife to stay but nevertheless conducts himself in such a way that his wife finds it intolerable to stay, and leaves. It is said then that the husband, by his conduct, drives his wife away, or his conduct is equivalent to expulsion. The most extreme statement of the law appears in

[1] *Simpson* v. *Simpson* [1951] P. 331 at 339.
[2] [1953] 2 W.L.R. 748.
[3] [1950] P. 8.
[4] [1953] 1 All E.R. 232.
[5] *The Times*, July 29, 1953.

Boyd v. *Boyd*.[6] The husband in that case was convicted of incest with his daughter. After his release from prison his wife took him back, and later he was convicted of indecent assault on a girl of thirteen. His wife was terribly distressed, her health was affected, and she left him and petitioned for divorce on the ground of constructive desertion.

Bucknill J. said[7]:

> " It seems to me that the essential element in desertion must be the intention to bring the cohabitation to an end. It may be that the husband has behaved so badly that his wife leaves him, and it may be that this conduct amounts to cruelty, when the wife can get a divorce on that ground, but, before there can be a case of constructive desertion, the court must be satisfied that the conduct of the husband was such as to show a clear intention on his part to drive his wife away. There must be an intention on the part of the person charged with desertion to bring the cohabitation to an end. There is no evidence here of any such intention. The man seems to be a sexual pervert who is unable to control himself, but there is no evidence that at any time he has ceased to wish to live with his wife. It was his wife, on the other hand, who refused to live with him. It seems to me to be quite clear, therefore, that no case for constructive desertion has been made out."

The judge, however, allowed the petition to be amended and gave a decree on the ground of cruelty.

These proceedings can be criticised as follows

1. As the wife had shown " just cause " for leaving her husband, the question of the husband's intention was irrelevant.
2. If it was essential for the wife to prove that her husband intended to drive her away, there was such evidence as the husband is presumed to intend the natural consequences of his acts, and there was no evidence to rebut that presumption.
3. The decree on the ground of cruelty was inconsistent with the same judge's judgment in *Horton* v. *Horton*,[8] in that what he did was a manifestation of his own character, acting in its own sphere, and also of his judgment in *Kaslefsky* v. *Kaslefsky*,[9] in that the acts were not " aimed at " the wife. (See also the statements of Denning L.J. in *Kaslefsky*, *Westall*[10] *and Hosegood*.[11])

Boyd v. *Boyd*[12] was considered by Divisional Court on an appeal from justices.[13] The President, Lord Merriman, said that it had become the practice, when the husband had a weak case, to rely

[6] [1938] 4 All E.R. 181.
[7] *Ibid.*, at p. 182.
[8] [1940] P. 187.
[9] [1951] P. 38.
[10] (1949) 65 T.L.R.
[11] (1950) 66 (Pt. I) T.L.R. 735.
[12] [1938] 4 All E.R. 181.
[13] *Edwards* v. *Edwards* [1948] P. 268.

on *Boyd* v. *Boyd* [14] as an authority for saying that the husband had to intend to drive his wife away. He emphatically disapproved of this decision, and he asserted the principle that a man must be taken to intend the natural consequences of his acts, and that this principle applied not only to his direct treatment of her, but also to the husband's conduct with a third person, which he must know would affect her directly. Barnard J., agreeing with the President, referred to *Sickert* v. *Sickert*,[15] where a wife had left her husband because of his adulterous association with another woman, and where Gorell Barnes J. had said that a wife with any self-respect would, in such circumstances, leave her husband, and therefore the husband must be taken to intend this consequence.

The President concluded his judgment hopefully with the words, "I hope we shall not be confronted with it (*Boyd* v. *Boyd*) [16] again." [17]

He was doomed to disappointment, for *Boyd* v. *Boyd* [18] found a sturdy defender in Denning L.J. in *Hosegood* v. *Hosegood*,[19] a defence which, however, failed to impress the President.

In *Hosegood* v. *Hosegood*,[20] Denning L.J. argued that there were two schools of thought on constructive desertion:

(1) Those who said that, however bad the husband's conduct was, there was no desertion unless he intended to bring the married life to an end.

(2) Those who paid lip-service to this doctrine, but said he must conclusively be presumed to intend the natural consequences of his acts.

He for his part favoured the first view, which was the view of Bucknill J. in *Boyd* v. *Boyd*,[21] which he thought was logically unanswerable, and disapproved of both *Sickert* v. *Sickert* [22] and *Edwards* v. *Edwards*,[23] which supported the second view. When it is remembered that *Sickert* v. *Sickert* [24] had been treated as good law for fifty years, it is remarkable that this was the first time it had been criticised, and it might be thought that a view of the law which inevitably meant that *Sickert* v. *Sickert* [25] was wrong must itself be suspect. If you start with the premise that an intention to drive away is an essential element in constructive desertion then, no doubt, *Boyd* v. *Boyd* [26] is logically unassailable; but that view not only involves holding *Sickert* v. *Sickert* [27] and similar cases

[14] [1938] 4 All E.R. 181.
[15] [1899] P. 278.
[16] [1938] 4 All E.R. 181.
[17] *Edwards* v. *Edwards* [1948] P. 268 at 272.
[18] [1938] 4 All E.R. 181.
[19] (1950) 66 (Pt. I) T.L.R. 735.
[20] (1950) 66 (Pt. I) T.L.R. 735.
[21] [1938] 4 All E.R. 181.
[22] (1899) 65 T.L.R. 337.
[23] [1948] P. 268.
[24] (1899) 65 T.L.R. 337.
[25] (1899) 65 T.L.R. 337.
[26] [1938] 4 All E.R. 181.
[27] [1899] P. 278.

to be wrongly decided, but also that cruelty itself is not sufficient "just cause" for a wife leaving her husband. It would also mean that the wife in *Boyd* v. *Boyd*[28] would herself be the deserter. The conclusion one is driven to is that Denning L.J. is arguing from a false premise. This, apparently, was the view of Lord Merriman in *Simpson* v. *Simpson*.[29] As a foundation for his argument, he begins with the principles of constructive desertion, which he says are nowhere more accurately, or more succinctly, stated than by Asquith L.J. in *Buchler* v. *Buchler*,[30] and which pointedly omit any mention of any intention to drive away. Asquith L.J. said[31]:

> "Constructively, the deserter may be the party who remains behind, if that party has been guilty of conduct which justifies the other party in leaving. Secondly, to afford such justification the conduct of the party staying on need not have amounted to a matrimonial offence, such as cruelty or adultery. But thirdly, it must exceed in gravity such behaviour, vexatious and trying though it may be, as every spouse bargains to endure when accepting the other 'for better or worse.' The ordinary wear and tear of conjugal life does not in itself suffice."

Lord Merriman says he is quite unrepentant, that *Boyd* v. *Boyd*[32] is wrong and *Edwards* v. *Edwards*[33] right, and points out that the latter was expressly approved in *Squire* v. *Squire*[34] and *Everitt* v. *Everitt*.[35] If *Boyd* v. *Boyd* were right, then the wife would be a deserter, which would be absurd; and in *Buchler* v. *Buchler*[36] both Lord Greene M.R. and Asquith L.J. had made it clear that, if the husband's association had been of a homosexual character, it would have been just cause for his wife's leaving him. He added:

> "I would observe . . . that, had the case been decided otherwise for that reason, such conduct would be neither more nor less 'aimed at' the wife than was the conduct of the husband in *Boyd* v. *Boyd*,[37] and would be neither more nor less a manifestation of his own character."

A good test of whether an intention to drive away is essential in constructive desertion is to consider the position in a claim by a spouse for restitution of conjugal rights. The court in such cases considers whether the conduct of the petitioner is such as to justify the other spouse staying away. The latest decision, *Timmins* v. *Timmins*,[38] in the Court of Appeal, is in line with previous decisions. There the trial judge acquitted the husband of cruelty and granted him a decree of restitution, although he had grave fears that if

[28] [1938] 4 All E.R. 181.
[29] [1951] P. 331.
[30] [1947] P. 25.
[31] [1947] P. 25 at p. 45.
[32] [1938] 4 All E.R. 181.
[33] [1948] P. 268.
[34] [1949] P. 51.
[35] [1948] 2 All E.R. 565.
[36] [1947] P. 25.
[37] [1938] 4 All E.R. 181.
[38] [1953] 1 W.L.R. 757.

she went back she might have a mental breakdown, due to the husband's conduct. Denning L.J., who was one of the majority who reversed this decision on restitution, quoted in support the speech of Lord Herschell L.C. in *Mackenzie* v. *Mackenzie* [39]:

> "Take the case of a husband who has heaped insults upon his wife, but has just stopped short of that which the law regards as saevitia or cruelty; can he when his own misconduct led his wife to separate herself from him, come into court and, avowing his misdeeds, insist that it is bound to grant him a decree of adherence?"

He then quotes a number of cases,[40] where the conduct afforded good cause for leaving, and which was a defence to a suit for restitution. The reason for this is clear. The court considers the effect on the victim. In other words, the approach of the court is, or should be, objective.[41] This article is, in effect a plea that in these matters the view of Lord Asquith should prevail. By asking the question: "Has the party who stayed behind been guilty of conduct which justified the other in leaving?" we sidetrack those very troublesome questions of intention, whether expressed, real, inferred or presumed. By adopting the criterion of "just cause," we can see that the intention to drive away is not an essential element to be proved in every case, though in many cases it might be a very important element. The expression used by Lord Greene M.R. in *Buchler* v. *Buchler* [42] really supports this view, for he speaks of conduct "*equivalent* to an expulsion from the matrimonial home."

Conduct short of cruelty

That conduct short of a matrimonial offence may be sufficient just cause for one spouse to leave the other, one would have thought was well settled. It says so in the headnote to *Buchler* v. *Buchler* [43] and is supported by the judgments in the Court of Appeal in that case. This view was reiterated in *Edwards* v. *Edwards*,[44] and these decisions were in accord with previous authority. Recent statements by Hodson and Denning L.JJ. in *Pike* v. *Pike*,[45] to the

[39] [1895] A.C. 384 at p. 390.

[40] *Russell* v. *Russell* [1895] P. 31 (C.A.) (false accusations); *Beer* v. *Beer* (1906) 22 T.L.R. 338 (drunkenness); *Butland* v. *Butland* (1913) 29 T.L.R. 729 (drunkenness and violence short of cruelty); *G.* v. *G.* [1930] P. 72 (extravagance); *Russell* (*Marchioness of Tavistock*) v. *Russell* (*Marquis of Tavistock*) (1935) 80 S.J. 16 (wife's persistent friendship with other man); *Glennister* v. *Glennister* [1945] P. 30 and *Chilton* v. *Chilton* [1952] P. 196 (husband's association with other women).

[41] See counsel's argument in *Squire* v. *S.* [1949] P. 51 at p. 52: "The test to be applied is purely objective; what, motive apart, is the effect of the respondent's conduct on the petitioner?" This is the only instance we have been able to find of the use of the word "objective" in this connection. It seems very apt.

[42] [1947] P. 25 at p. 30.

[43] [1947] P. 25.

[44] [1950] P. 8.

[45] [1953] 1 All E.R. 232.

effect that where the complaint is in the nature of cruelty, nothing short of cruelty would do, do not seem to fit in with this view. Davies J. in *Dixon* v. *Dixon*[46] found these cases difficult, if not impossible, to reconcile.

In 1949, Hodson J. in *Barker* v. *Barker*[47] in the Divisional Court said:

> "It will not do to say that because a grave and weighty matter will justify one spouse in leaving the other, therefore something less than cruelty will do. The grave and weighty matter which justifies one spouse leaving the other is very often something different from cruelty, and something which might even be regarded as more calculated to disrupt family life, such as the persistence in a false allegation of a criminal charge, which was the subject of the decision in *Russell* v. *Russell* itself. Many people might regard this as something worse than cruelty involving the mere infliction of a physical injury causing injury to health. The existence of cruelty depends not on the magnitude but rather on the consequence, actual or apprehended, of the offence; and dealing with conduct which is either cruelty or not cruelty, it is, in my view, not open to any court to say, 'This is not cruelty, but is so near it that it amounts to a grave and weighty matter justifying separation. . . .'"

These views were considered in the Court of Appeal in *Edwards* v. *Edwards*[48] and expressly disapproved.

In *Pike* v. *Pike*,[49] we find Hodson L.J. saying in the Court of Appeal:

> "The danger in this class of case is that a person who is alleging constructive desertion without charging cruelty may be, in effect, making allegations of the character of cruelty which do not amount to cruelty, and, having done that, may come to the court and say: 'It is quite true I have made out no case on cruelty, but I have made out a case of constructive desertion, because the conduct of the other side was so bad that in the result there are grave and weighty reasons why I should not be compelled to live with him any longer.' But, of course, the real issue is whether the married life has been brought to an end by one party driving the other out. . . . I want to make it as clear as I can that when the case sought to be made is in the nature of a case of cruelty, it is not possible to build up a a case of constructive desertion by what is really a case of unproved cruelty. That, of course, does not cover the whole area of constructive desertion, for grave and weighty matters might be alleged which are quite different in kind and quite as serious, if not more serious, than cruelty. One has in mind the well-known case of *Russell* v. *Russell*, where false charges were made, persisted in, and not withdrawn, or, of course,

[46] [1953] 2 W.L.R. 748.
[47] [1949] P. 219 at p. 225.
[48] [1950] P. 8 at p. 14.
[49] [1953] 1 All E.R. 232 at p. 233.

> one can take the simple case of constructive desertion where there is an order or direction by one spouse to the other to leave. . . ."

It is difficult to see any distinction between the views expressed by Hodson L.J. in the Court of Appeal from the views he expressed in *Barker* v. *Barker*,[50] as a puisne judge sitting in a divisional court, though it may be that, as *Edwards* v. *Edwards* [51] was not cited in argument in *Pike* v. *Pike*,[52] the learned Lord Justice had overlooked what the Court of Appeal had said about his previous judgment. Denning L.J., perhaps for the same reason, said [53]:

> "If he had previously treated her with cruelty, so much so that there was a reasonable apprehension of injury to her if she went back, she would, of course, be justified in refusing to go back, but, if his conduct was less than cruelty recognised by law, I do not think she was justified. . . ."

Davies J., in *Dixon* v. *Dixon*,[54] pointed out that not only was *Pike* v. *Pike* [55] inconsistent with *Edwards* v. *Edwards* [56] and *Buchler* v. *Buchler*,[57] but also with a much older case of *Butland* v. *Butland*.[58]

In *Timmins* v. *Timmins*,[59] both Hodson L.J. and Denning L.J. seemed to have receded somewhat from the extreme position they took up in *Pike* v. *Pike*.[60] Denning L.J. says that when he said that conduct "less than cruelty" does not justify a spouse in leaving, he meant to say that conduct which is not grave and weighty, and for that reason is not cruelty, does not give good cause for leaving: *Yeatman* v. *Yeatman*.[61]

It is interesting to note that in *Timmins* v. *Timmins* Hodson L.J. dissented, and logically he was quite right in doing so, as he adopted precisely the same line as he had done in *Barker* v. *Barker* and *Pike* v. *Pike*, namely, that if the conduct of the husband did not amount to cruelty then the wife was not justified in leaving him. Therefore, in *Timmins* v. *Timmins*, he held the trial judge was quite right in ordering the wife to return to her husband. It is submitted, however, that the views of Denning L.J. in *Timmins* v. *Timmins*, though inconsistent with his views in *Pike* v. *Pike*, are right in accordance with authority.

Of course, it has always been recognised that conduct has to be "grave and weighty," and it may well be difficult to distinguish

[50] [1949] P. 129.
[51] [1950] P. 8.
[52] [1953] 1 All E.R. 232.
[53] [1953] 1 All E.R. at p. 235.
[54] [1953] 2 W.L.R. 748.
[55] [1953] 1 All E.R. 232.
[56] [1950] P. 8.
[57] [1947] P. 25.
[58] (1913) 29 T.L.R. 729.
[59] [1953] 1 W.L.R. 757.
[60] [1953] 1 All E.R. 232.
[61] (1868) L.R. 1 P. & D. 489.

between conduct which is cruelty, and conduct falling short of cruelty which is nevertheless "grave and weighty," but the court has made this distinction in appropriate cases.[62]

An attempt has been made to distinguish between conduct "different from" cruelty and conduct "less than" cruelty.[62a] It is suggested that this is a distinction that cannot easily be made. Cruelty itself may be caused by the most diverse conduct, and by what criterion is one to distinguish conduct which is "different from" cruelty, which is nevertheless "just cause" for one spouse leaving the other, and conduct which is "less than" cruelty, which is not "just cause," assuming in each case that the conduct is grave and weighty? This supposed distinction only causes confusion, and, bearing in mind that the conduct must be "grave and weighty" and the well-known conservatism of judges, the fear that unauthorised grounds for divorce will creep in is not worth serious consideration.

"*Aimed at*"

The Matrimonial Causes Act, 1950, s. 1 (*c*),[63] which replaced the Matrimonial Causes Act, 1937, s. 2,[64] provides that a petition for divorce may be presented to the court on the ground that "the respondent has since the celebration of the marriage treated the petitioner with cruelty." Bucknill L.J.[65] thought that the use of this word "treated" implied that the acts of cruelty must be "aimed at" the respondent, and approved of this expression, which apparently was invented by Denning L.J. in *Westall* v. *Westall*[66] and repeated in subsequent cases. Whether this is a valid doctrine or not, it is now plain that the word "treated" has no special significance, and the House of Lords[67] has now decided that what the petitioner has to prove in respect of cruelty is the same as before the Act, and that cruelty has the same meaning in Scotland as in England, although the Scottish Act omits the word "treated."

There is a tendency by judges in explaining the meaning of simple words in an Act to extend or distort their meaning. Explanations which fit a particular case are less apt when laying down a general rule. There was a tendency for a time to insist that "malignity" was an essential element in cruelty. In other words,

62 There are cases however where the conduct is either cruelty or nothing. Such a case was *Barker* v. *Barker* [1949] P. 219. (See Lord Merriman's remarks at p. 220.)

62a *Foster* v. *Foster* [1953] 2 All E.R. 518 is a recent example of a case where cruelty had been negatived and yet a verdict of constructive desertion upheld, but in order to fit in with the dicta in *Pike* v. *Pike* there had to be an almost casuistical juggling with the expressions "different from" and "less than" cruel conduct.

63 14 Geo. 6, c. 25.

64 1 Edw. 8 & 1 Geo. 6, c. 57.

65 *Kaslefsky* v. *Kaslefsky* [1951] P. 38 at 45.

66 (1950) 66 (Pt. 1) T.L.R. 735.

67 *Jamieson* v. *Jamieson* [1952] A.C. 525.

as expressed by Finnemore J.,[68] the cruelty must be "deliberate, malignant or intended." The Court of Appeal[69] (Evershed M.R., Tucker L.J., Hodson J. dissenting) overruled this. It is submitted that "aimed at" is "malignity" rearing its ugly head in another form.

Just as "malignity" is present in most cases of cruelty, so it can be said that in the great majority of cases the conduct complained of was "aimed at" the other spouse; but there are also cases of undoubted cruelty, where to say the conduct was "aimed at" the other spouse is a misuse of language. When the man committed incest and then assaulted a little girl, can it really be said his conduct was "aimed at" his wife? The finding, indeed, was that it was not. The lunatic who killed his child was found to have been cruel to his wife.[70] Can it be said his conduct was "aimed at" his wife? The woman who kept hordes of cats, because she liked cats, was not "aiming at" her husband.[71] In these cases the spouses concerned were just being their own nasty selves, with disastrous consequences to their partners in matrimony.

Consider two recent cases. A wife formed an affectionate association with another woman, so as to give the husband grave cause for anxiety that she was guilty of Lesbianism (which was not proved), and who persisted in her friendship in spite of her husband's entreaties. Karminski J. had no difficulty in finding cruelty proved (*Spicer* v. *Spicer* [1954] 1 W.L.R. 1051).

In the other case, *Eastland* v. *Eastland* [1954] 2 W.L.R. 851, the husband's shiftless and irresponsible conduct had caused the wife great distress. One of her main complaints was that the husband had persistently refused to give her money for food or other purposes, in spite of her repeated protests, had told her to get goods on credit and subjected her to the humiliation of being pestered for payment, while withholding the means of payment from her. The learned judge held that the husband did not desire to injure his wife, and that this conduct was not aimed at his wife, nor directed against her; nor did in any way impinge upon her, and therefore in spite of the wife's sufferings the husband was not guilty of cruelty.

One would have thought in the first case, that the wife was pursuing her own tastes rather than aiming at her husband. In the second case, while the husband no doubt had no desire to hurt his wife, in withholding money from her she was the direct object of his misconduct.

The truth is that the "aimed at" doctrine is an unsuccessful attempt to devise a universal yardstick. To change the metaphor, it is in danger of becoming a strait jacket, and ignores the warnings of the House of Lords that attempts to define cruelty, or to restrict

[68] *Squire* v. *Squire*, 63 T.L.R. 572.
[69] *Squire* v. *Squire* [1949] P. 51.
[70] *Lissack* v. *Lissack* [1950] 2 All E.R. 213.
[71] *Winnan* v. *Winnan* [1949] P. 174.

the court in considering what acts are and what are not cruelty, are dangerous and doomed to failure.[72]

It is conceded by Denning L.J. that drunkenness, gambling or crime, may readily be inferred to be " aimed at " the wife, because a person is presumed to intend the natural consequences of his acts. This, of course, relieves the " aimed at " rule of much of its sting, and makes one wonder whether it is worth while enunciating at all. Denning L.J. goes on[73]:

> " In cases of this kind, if there is no desire to injure or inflict misery on the other, the conduct only becomes cruel when the justifiable remonstrances of the innocent party provoke resentment on the part of other, which evinces itself in actions or words actually or physically directed at the innocent party. . . ."

What does this mean? Does it mean that, if a wife protests to her husband that she cannot stand his drunkenness, gambling or criminal life, and that it is making her ill, only if (a) he tells her, *e.g.*, to go to hell, or (b) gives her a blow, he is guilty of cruelty? Or will mere persistence in the objected conduct be sufficient? The latter is, on authority, the correct view, provided the conduct is sufficiently grave and weighty; and even without remonstrance, if the activity is serious enough.

Denning L.J.'s insistence on this doctrine is all the more extraordinary when it is remembered that he takes the extreme view in the insanity cases, and holds that a lunatic who does not know what he is doing, and does not know that he is doing wrong, can still be guilty of cruelty.[74] This was followed in *Lissack* v. *Lissack*,[75] where the murder of the child was not aimed at the wife; but, apart from that, how can a person who has no mind " aim at " anything? If a man cannot have any intention, he cannot have the intention necessary to aim cruel conduct at his wife.

If conduct is " aimed at " the other spouse it may be more easily recognised as cruelty, because, as Lord Norman said in *Jamieson* v. *Jamieson*[76]:

> " I am of opinion that actual intention to hurt may have in a doubtful case a decisive importance. . . . Actual intention to hurt is a circumstance of peculiar importance, because conduct which is intended to hurt strikes with a sharper edge than conduct which is the consequence of mere obtuseness or indifference. . . ."

Lord Tucker said[77]:

> " My Lords, judges have always carefully refrained from attempting a comprehensive definition of cruelty for the purposes of matrimonial suits, and experience has shown the

[72] *Jamieson* v. *Jamieson* [1952] A.C. 525.
[73] *Kaslefsky* v. *Kaslefsky* [1951] P. 38.
[74] *White* v. *White* [1950] P. 39. His view has not been adopted by the Court of Appeal. *Swan* v. *Swan* [1953] 2 All E.R. 854.
[75] [1950] 2 All E.R. 213.
[76] [1952] A.C. 525 at p. 550.
[77] *Jamieson* v. *Jamieson* [1952] A.C. at p. 550.

wisdom of this course. It is in my view equally undesirable—if not impossible—by judicial pronouncement to create certain categories of acts or conduct as having or lacking the nature or quality which render them capable or incapable in all circumstances of amounting to cruelty in cases where no physical violence is averred.

"Every such act must be judged in relation to its attendant circumstances, and the physical or mental condition or susceptibilities of the innocent spouse, the intention of the offending spouse and the offender's knowledge of the actual or probable effect of his conduct on the other's health (to borrow from the language of Lord Keith) are all matters which may be decisive in determining on which side of the line a particular act or course of conduct lies. . . ."

We conclude, therefore, that whereas intention to hurt may be an important element in cruelty cases, it is not essential to show that the conduct was "aimed at" the other spouse.

"*Character*" [78]

We start off with another judgment of Bucknill J. in *Horton* v. *Horton*.[79] This was a husband's petition alleging cruelty. The judge found that the wife had, out of jealous spite, damaged his masonic regalia and scratched his glasses, that she had assaulted him and nagged him, and had acted with malevolence and with an evil, unwifely spirit, and that he had suffered in health in consequence. He held she had treated her husband with cruelty and granted a decree. So far there is nothing special about the case. The judge, however, used these words [80]:

"Mere conduct which causes injury to health is not enough. A man takes the woman for his wife for better or for worse. If he marries a woman whose character develops in such a way as to make it impossible for him to live happily with her, I do not think he establishes cruelty merely because he finds life with her is impossible. He must prove that she has committed wilful and unjustifiable acts inflicting pain and misery upon him and causing him injury to health. In this case, the husband's health was not injured merely by the development and manifestation of the wife's character acting so to speak in its own sphere. It was injured by her wilful and unjustifiable conduct to him, which was an intrusion and did violence to his own mode of living. . . ."

The intrusion of the question of the wife's character was both unnecessary and confusing. Since the judge found that the wife committed wilful and unjustifiable acts upon the husband amounting to cruelty, his remarks about character were at best obiter. His words are confusing because it is not easy to understand what is

[78] See the writer's article "Cruelty in Matrimonial Causes" 12 M.L.R. 324 at 344.

[79] [1940] P. 187.

[80] [1940] P. 187, at p. 193.

meant. Obviously, her conduct was due to her character—she was a spiteful person—but her character is irrelevant, because it was her conduct that mattered. The court is not concerned, or should not be concerned, whether her conduct was in character or out of character. The court is only concerned in what her conduct was and whether it amounted to cruelty. In one sense the question of her character was important—in the opposite sense intended by the judge. If a person has a spiteful character, she is more likely to repeat her spiteful conduct, and, therefore, all the more reason why the victim should be safeguarded; but, generally speaking, questions of character cloud the issue.

What the judge may have meant—and no one can quarrel with this—was that there is certain conduct which a spouse has to put up with; it is part of the ordinary wear and tear of married life. A spouse may be short-tempered, or fond of drinking, or gambling, or going to the club too much, and so on, activities which might cause unhappiness to the other spouse but which have to be borne; but if the short temper leads to blows; or the drinking to drunkenness and disgusting conduct, such as habitual fouling of the bed; or the gambling becomes persistent and ruinous, then that is conduct for which the spouse may have a remedy; but all this is a question of degree, and to ask, "Is this a development of the husband's character in its own sphere?" does not conspicuously help the inquiry.

The point was well made nearly a hundred years ago by Lord Penzance in *Hall* v. *Hall*,[81] when he said:

> "With danger to the wife in view, the court does not hold its hand to inquire into motives and causes. The sources of the husband's conduct are, for the most part, immaterial. . . ."

A striking contrast is shown by the case of *Timmins* v. *Timmins*.[82] This was a case where the husband was domineering and overbearing. He admitted striking his wife on one occasion. It was alleged that his treatment had driven her into a mental home (though apparently the trial judge did not find this as a fact), and when she came out of the home he treated her with unkindness. The judge did not find cruelty proved, and gave the husband an order for restitution of conjugal rights, though with some misgivings, as he felt if she went back she would have another breakdown. In the Court of Appeal, the finding as to cruelty was not interfered with but the majority reversed the decree of restitution.

Denning L.J., after expressing surprise that the judge had acquitted the husband of cruelty, uses these words:

> "But the judge has expressly found that her breakdown was not due to any 'wrongful conduct' on the part of the husband. Having regard to his other findings, this must mean,

[81] (1864) 3 S. & T. 347.
[82] [1953] 1 W.L.R. 757.

> I think, that the domineering conduct of the husband was not done with any intent to injure or inflict misery on the wife. It was simply a defect of temperament manifesting itself in a most unpleasant way. . . ." [83]

This is a sad doctrine. It does not square with *Evans* v. *Evans*,[84] *Forth* v. *Forth*,[85] or *Kelly* v. *Kelly*,[86] where Lord Penzance said:

> "He, the husband, says he does not desire to injure her, and it has never been asserted that he does. But still she has nothing to hope for, for Mr. Kelly is acting in discharge of a religious duty."

In *Kelly* v. *Kelly*, as in *Bethune* v. *Bethune*,[87] and *Mytten* v. *Mytten*,[88] the court has not hesitated to grant a decree where the cruelty consisted of tyrannical conduct arising out of the domineering character and temperament of the husband. With all due respect, it seems the height of absurdity for a man to be acquitted of cruel conduct because he says: "Well, I can't help it; that is how I am made. It is part of my character and temperament: I am just being my nasty self."

If the conduct was criminal, he would get short shrift. One fails to see why he should get less for a matrimonial offence. It not only flies in the face of good sense, but it is contrary to long established authority.

Of course, there is a sense, when a spouse's character has to be taken for better or worse. As Lord Asquith said in *King* v. *King* [89]:

> "It is true that, generally speaking, a man marries at his peril as to the character his wife may disclose. She may develop on quite unexpected lines. She may prove, contrary to all expectation, touchy, perverse, cross-grained and temperamental. She may make wild unfounded charges against him, and he may, in the circumstances, have no remedy. But it does not follow from this that the indefinite repetition of false charges, however frequent the repetition, and however wounding the charges, may not reach a point at which it passes into the realm of cruelty, affording a ground for divorce. Indeed, it has often been held to be so."

[83] In contrast to this are the words of Lloyd-Jacob J. in the same case:—

> "The preservation of her sanity is, in my judgment, a grave and weighty matter, and for the husband to behave in an overbearing, domineering and dictatorial manner when he has once appreciated the consequences of such behaviour to her state of mind would no longer be an exercise of his frailty, but a wickedly cruel matrimonial offence. The husband's conduct in relation to the removal of his second child from the mother's custody, and his rejection of his wife's offer to return to the matrimonial home for a few days, illustrate such lack of consideration as to satisfy me that a return under an order of the court might be fraught with the gravest peril. I could not be a party to such a consequence.".

It is difficult to see why Lloyd-Jacob J. did not find that the husband was guilty of cruelty in this case.

[84] (1790) 1 Hag.Con. 35 at p. 38.

[85] (1867) 16 L.T. 574.

[86] (1865) L.R. 2 P. & D. 59 at p. 72.

[87] [1891] P. 205.

[88] (1886) 11 P.D. 141.

[89] [1953] A.C. 124.

In short, it is conduct, not character that counts in considering cases of cruelty and constructive desertion.

Conclusion

> " The modes by which one of two married persons make the life or health of the other insecure are infinitely various " (*per* Channell B. in *Kelly* v. *Kelly*).[90]

Time and again the courts have pointed out the danger of defining cruelty, and the same is true of constructive desertion. There is a temptation for courts to lay down rules which, while quite applicable to the case in hand, are nevertheless stated so widely as to be thought to refer to other cases, where the facts are different. Examples of this kind have been examined above, and we think we have shown that the creation of these formulae have led to confusion and uncertainty in this branch of the law. The time has clearly come for the highest courts to clear away these confusions.

LIONEL ROSEN.*

[90] (1865) L.R. 2 P. & D. 59, at p. 60.

* LL.M., Solicitor of the Supreme Court; sometime Lecturer in Divorce and Private International Law, University College, Hull.

THE REMEDY OF AN EJECTED LICENSEE

DESPITE the recent cases (*Winter Garden Theatre Case* [1946] 1 All E.R. 678 at 685, *Bendall* v. *McWhirter* [1952] 2 Q.B. 466 at 480) in which the courts have stated that they will grant an injunction to restrain the premature revocation of a contractual licence the learned editor of Salmond, Mr. R. F. V. Heuston, has pointed out at p. 280 that "it is still no easier than before to understand what the law is . . . if the licensee has been . . . actually ejected (as in *Hurst's* case) before the aid of equity can be invoked." In *Hurst* v. *Picture Theatres, Ltd.* [1915] 1 K.B. 1, a licensee, who had been ejected from the licensors' premises in breach of his contractual licence, recovered damages for assault against the licensors. It is submitted that this remedy may be justified, without the need to resort to equity, by a principle of the common law applied by the House of Lords in *Elder Dempster* v. *Paterson Zochonis* [1924] A.C. 522, and succinctly stated by Scrutton L.J. in *Hall* v. *Brooklands Auto-Racing Club* [1933] 1 K.B. 205 at 213: "Where the defendant has protection under a contract, it is not permissible to disregard the contract and allege a wider liability in tort."

Sir Frederick Pollock has defined a licence as "that consent which, without passing any interest in the property to which it relates, merely prevents the acts for which consent is given from being wrongful" (*Torts*, p. 300). The terms of a contractual licence are that for a certain period the licensee may enter on the licensor's land lawfully and not as a trespasser. Thus a contractual licensee is a person who has protection under a contract because by the contract it is agreed that conduct shall be lawful which would otherwise be tortious.

At common law a bare licence, even although it be contained in a contract, may be revoked at will by the licensor: *Wood* v. *Leadbitter* (1845) 13 M. & W. 838. But the revocation will be ineffective unless it can then be enforced either by the licensor bringing an action for trespass against the licensee or by the former forcibly ejecting the latter without making himself liable thereby for assault. Thus, according to one view, the right of the deserted wife to live on in the matrimonial home is founded on the ineffectiveness of a revocation which cannot be enforced. The husband may withdraw his permission for the wife to reside in the home but he cannot then bring an action against her because section 12 of the Married Women's Property Act, 1882, forbids a husband to sue his wife for a tort, Goddard L.J. stating in *Bramwell* v. *Bramwell* [1942] 1 K.B. 370 at 374: "I have the greatest

doubt whether a husband can bring an action for the recovery of land against his wife, alleging that she is wrongly in occupation of it, because, if she is wrongly in occupation of the land and he has a right to the possession of it, it seems to me she is a trespasser and therefore he is suing her for a tort." Thus in *Bendall* v. *McWhirter* [1952] 2 Q.B. 466 at 485, Romer L.J. (with whose judgment Somervell L.J. concurred) stated that a wife "has no legal or equitable interest in the home which she continues to occupy, and in that respect is in no better position than any other licensee. On the other hand, her husband, the licensor, cannot bring proceedings against her in ejectment, for the status of matrimony prevents it. He accordingly cannot *effectively* revoke her licence, and in this respect the wife is in a more favourable position than that of an ordinary licensee."

When a licensor revokes after one hour a contractual licence granted for two hours, the licensee no longer has the licensor's leave to be on his land, but the contract itself is still in existence because mere unilateral breach cannot end a contract. Viscount Simon in *Heyman* v. *Darwins* [1942] A.C. 356 at 361 stated: "The first head of claim in the writ appears to be advanced on the view that an agreement is automatically terminated if one party 'repudiates' it. That is not so . . . repudiation by one party standing alone does not terminate the contract. It takes two to end it, by repudiation, on the one side, and acceptance of the repudiation, on the other." Similarly in *Hain Steamship Co., Ltd.* v. *Tate & Lyle, Ltd.* (1936) 52 T.L.R. 617 at 622, Lord Wright stated: "One party to a contract cannot end it by his wrongful act against the wish of the other party." Therefore a licence embodied in a contract consists of two parts: (1) the licence which may be revoked at any time, and (2) the contract which cannot be ended merely at the will of the licensor. Thus in the above case, the licence or permission of the licensor has been withdrawn and such withdrawal cannot be prevented by the common law, but the contract itself, under which the licensee has protection, is still in existence and will only end at the termination of the two-hour period unless the licensee accepts the repudiation and rescinds the contract. If, after the revocation, the licensor ejects the licensee before the expiration of the two hours and is sued for assault he will plead in defence, as did the defendant in *Wood* v. *Leadbitter*, that the plaintiff was on the land without leave and was therefore a trespasser. But it is submitted that the rule applied in the *Elder Dempster* case absolutely prevents the defendant from putting forward this plea and that therefore he has no defence to the action for assault. The parties have regulated their relationship by a contract which has fixed their respective rights; the licensor has agreed that for two hours the licensee will not be a trespasser on his land and the latter having protection under this

contract, in the words of Scrutton L.J. "it is not permissible to disregard the contract and allege a wider liability in tort."

The *Elder Dempster* case was concerned with a party who, as plaintiff, sought to disregard the other party's protection under a contract by alleging a wider liability in tort, and Scrutton L.J., in his statement of the rule, also contemplated the evasion of a defendant's contractual protection by a plaintiff, but it is submitted that the rule applies with equal force where a party is seeking, as a defence, to allege a wider liability in tort against a plaintiff who has protection under a contract. The basis of the rule is that when parties have agreed on their respective rights by contract, then the contract alone defines those rights, and this principle will bind a party irrespective of whether he happens to be a plaintiff or a defendant in a particular action. Thus in *Grand Trunk Railway Company of Canada* v. *Robinson* [1915] A.C. 740, where a railway company had protection under a contract between it and a passenger in respect of the tortious negligence of its servants, Viscount Haldane stated at p. 747 that where a contract affords protection from liability in tort : "The specific contract . . . becomes in such a case the only measure of the duties between the parties."

Therefore it is submitted that in respect of the period agreed upon in a contractual licence, the licensor, even although he has revoked the licence, can neither sue the licensee for trespass nor allege as a defence that he was a trespasser since "the specific contract . . . becomes in such a case the only measure of the duties between the parties" and by that contract the licensee had a right to be on the land. The licensee has protection under the contract which the licensor is not permitted to disregard.

Wood v. *Leadbitter* itself is not contrary to this view since in the *Winter Garden Case* [1948] A.C. 173, at 190, Viscount Simon pointed out that "the only issue to be decided in *Wood* v. *Leadbitter* was whether the plaintiff, when he was forcibly removed from Lord Eglintoun's land, continued to have the leave of Lord Eglintoun to be there; and he had not this leave because it had been withdrawn. On the pleadings in that case, the question was not open whether the effect of the contract was not to preserve the plaintiff from being treated as a trespasser until the races were over."

J. B. E. Hutton.*

* B.A.(oxon.), of the Inn of Court of Northern Ireland, Barrister-at-Law.

STATUTES AND REPORTS OF COMMITTEES

Law Reform (Enforcement of Contracts) Act, 1954 [1]

The Statute of Frauds is dead; long live the contract of guarantee. It is in this traditional form of announcement at the demise of a monarch that one is tempted to greet the Enforcement of Contracts Act, 1954, an enactment which marks an historic event.

Few statutes in English law have been so consistently criticised for so long a period of time as the Statute of Frauds, 1677. The principal result of its technical, procedural requirements was to afford an opportunity for technical, unmeritorious defences. Both the Judiciary and plaintiffs' counsel laboured hard to restrict the scope of its spacious wording. Its provisions were steadily repealed until only section 4 (with part re-enacted in the Law of Property Act, 1925, s. 40) and section 17 (re-enacted in the Sale of Goods Act, 1893, s. 4) remained. Even in this attenuated form, its well of contentious possibilities was seemingly inexhaustible. In the first edition of his classical treatise on sale of goods, Benjamin found it necessary to devote over 130 pages to section 17 (as amended in section 7 of the Statute of Frauds Amendment Act, 1828). Later, Professor J. Williams was able to fill a monograph with a discussion of section 4.[2] In the lives of members of the legal profession during the eighteenth and nineteenth centuries, the Statute appears to have assumed the role that is filled in this century by the Rent Acts. After the mid-nineteenth century, its irrelevance to the realities of proof and procedure in the courts became quite spectacular. In all these circumstances, its persistence paid an impressive tribute to the inadequacy of law-reform machinery in England.

Now, section 4 of the Sale of Goods Act, 1893, has been repealed. The evidentiary requirement for any special promise by an executor or administrator to answer damages out of his own estate has been repealed. And, the similar requirements for any agreement made upon consideration of marriage and for any agreement that is not to be performed within the space of one year from the making thereof have been repealed. Only the Law of Property Act, s. 40, and the contract of guarantee survive.

The relatively complicated nature of real property transactions justifies, on the whole, the continuance of section 40.[3] Between

[1] Based on the Law Revision Committee's Sixth Interim Report (1937), Cmd. 5449; and on the Law Reform Committee's First Report (1953), Cmd. 8809.

[2] *The Statute of Frauds, s. 4*, 1932, C.U.P.

[3] S. 40 was not within the terms of reference of either the Law Revision or the Law Reform Committee.

initial approval and final agreement, title may have to be investigated, the condition of the property surveyed and satisfactory financial arrangements made. Usually, too, a real property transaction involves substantial sums of money, sometimes the savings of a lifetime. There is an acceptable if occasionally rough justice, where real property affairs are concerned, in delaying the conclusion of an agreement of perfect obligation.

Justification for retaining the special position, in this respect, of contracts of guarantee is more difficult to find. The majority of the Law Revision Committee in 1937 recommended the abolition of any requirement of special form. A minority recommended that, for the better protection of guarantors, contracts of guarantee should be *void* unless reduced to writing, signed by the guarantor. The reasoning of the minority was followed by the Law Reform Committee in 1953, who felt, however, that the evidentiary requirement for contracts of guarantee in the Statute of Frauds should remain as it stood.

One reason for the minority recommendation in 1937 was expressed as follows: "There is a real danger of inexperienced people being led into undertaking obligations that they do not fully understand, and . . . opportunities will be given to the unscrupulous to assert that credit was given on the faith of a guarantee which in fact the alleged surety had no intention of giving"; and it was pointed out that, "neither judges nor juries are infallible on questions of fact." But these considerations and dangers surely affect almost every kind of oral contract, including oral contracts of indemnity.[4] If judges wished to protect guarantors against the danger described, they could do so by adopting a policy of requiring the strictest proof of the terms by the creditor. However, since now a guarantee is unenforceable unless evidenced in writing, it seems more likely that unscrupulous guarantors, on whose promises credit has been extended, will step behind the Statute if they no longer feel inclined to fulfil their obligations.

The minority in 1937 suggested a further justification for their proposal: "It is the 'small man' we desire to protect, the father or father-in-law of the small tradesman who may be pressed to guarantee the account for goods supplied to stock the shop of his son or son-in-law." This kind of case, it must be confessed, does possess a powerful emotional appeal. But, what protection has the father-figure been given that a judicial policy of the kind above mentioned would not give?

(1) If the bargain is oral, the father can, as the law stands, safely resile from it; but the violation of a serious undertaking is clearly not intended by the legislature.

[4] The incongruity in the different treatment of contracts of guarantee and indemnity was noted by the Law Revision Committee in their Report at p. 11, but brushed aside by the Law Reform Committee in 1953.

(2) "A guarantee," said the minority report, "is . . . a special class of contract; it is generally one-sided and disinterested as far as the surety is concerned." One may pause at this point to comment that the disinterested father who is backing his son's future with his own money is, with respect, an interesting contradiction in ideas. But, the report continues: ". . . and the necessity of writing would at least give the proposed surety an opportunity of pausing and considering, not only the nature of the obligation he is undertaking, but also its terms." As to the nature of the obligation, is it suggested that the father should pause and consider and refrain from keeping his son out of the county or bankruptcy court? In any case, the nature of the obligation is surely plain to any person asked to be a guarantor, in the absence of misrepresentation. As to the terms, here we reach what is the heart of the matter.

The Act, it should be remarked, provides creditors with the strongest motive to ensure that contracts of guarantee are in writing. Suppose the father does not like the written terms his son's creditors set before him to sign. The alternative, in the face of unyielding creditors, is to do what the majority of tradesmen would already have done in any case today, namely, apply to the bank for an overdraft. The father, we assume, is asked to guarantee his son's overdraft. In this event, as the minority pointed out, a written contract will again be set before the father for his signature. It will be in the standard form of contract of guarantee that is used by banks. Its main object, as a leading authority on banking law has described it, is "to keep a free hand for the bank, and a tight one on the guarantor."[5] Or, in the more explicit words of another learned writer on banking law, "a banker, when taking a guarantee, proceeds to strip a guarantor of virtually all those rights which the law would otherwise confer upon him—at any rate where they conflict with the banker's interests."[6] It is a striking example of the contractual autocracy that may result where one party occupies a position of overwhelming, bargaining superiority. For the guarantor, the writing contains, it is respectfully suggested, a greater legal danger than the possibility that a creditor might perjure himself.

At least, where a contract of guarantee is oral, the guarantor enjoys the advantage of the substantial common law protection developed by the courts in the light of the Good Samaritan nature of the guarantor's act and his common lack of bargaining power. The mere requirement of evidence in writing is the flimsiest of shields, which can hardly be said, with conviction, to be better

[5] See Paget, *Law of Banking*, 5th ed., p. 417; also, Chorley, *Law of Banking*, 3rd ed., p. 248.

[6] Dr. J. M. Holden in his book, *Securities for Bankers' Advances*, which contains a most able and lucid discussion of the relationship between a guarantor's common law rights and the relevant clauses in the banks' contract of guarantee (at pp. 173–203).

than nothing at all. The strong concern that has often been expressed for the defenceless condition of guarantors has, up to the present, stopped short of recommending, in any form, the one effective protection the law could devise, namely, legislative control of the terms of contracts of guarantee.

C. Grunfeld.

Report of the Departmental Committee on New Trials in Criminal Cases (Cmd. 9150 : May 1954)

In view of the persistent pressure from influential quarters in favour of giving the Court of Criminal Appeal power to order a new trial, it was almost inevitable that sooner or later some Government would set up a Committee to inquire into this proposal. In view of the passions that are aroused by the notion of a second trial, it was hardly likely that any such Committee could have reached a unanimous conclusion. Yet it might have been expected that the balance of opinion would come to rest in favour of the proposal, and because this is not what has happened it is submitted that the result of the Committee's deliberations are something of a disappointment.

The Committee was appointed in December, 1952, under the chairmanship of the Right Honourable Lord Tucker, and held ten meetings. Oral and written evidence was received from a wide variety of sources in this country, and much information was collected from overseas. The Report, which runs to thirty-seven pages, includes most elaborate tabular analyses of the evidence received from the Dominions (with one or two exceptions), and the experience of the Allied High Commission Courts in the British Zone of Germany has also been taken into account. It appears from this evidence from other countries that there is a remarkable unanimity of legal opinion in favour of the power to order a new trial, which is in fact regarded as an essential part of the judicial machinery, designed to secure that the guilty shall not escape by reason of some defect in the machine.

The Report contains a most interesting and valuable sketch of the historical background to this proposal, from which it appears that this is no new idea : a power to order new trials in criminal cases was under discussion over a century ago, and had been the subject of no less than twenty-five Bills prior to the passing of the Criminal Appeal Act of 1907. Efforts were made to include in the 1907 measure a clause empowering the proposed Court of Criminal Appeal to order a new trial, but this proposal was met with assurances that ample powers were already being conferred by the Bill to enable the Court of Criminal Appeal to see that justice was done. The Report explains that " it may well have been thought by some, at the time the Act was passed, that the powers given to the Court

of Criminal Appeal by . . . the Criminal Appeal Act . . . would enable the Court, in suitable cases, virtually to retry the case" (p. 6).

Once the court was established, however, it became clear that it would never substitute its own decision for the verdict of the jury, and that the proviso to section 4 (1), which enabled it to dismiss an appeal if no substantial miscarriage of justice has actually occurred, was not to be used to procure a retrial in the Appeal Court. The proviso was only used to enable the court to overlook trivial irregularities. The Report goes on to say that "this being the way the Criminal Appeal Act, 1907, has worked in practice, it was soon found that there were a number of cases in which there had been some irregularity or misdirection at the trial which could not be dismissed as trivial, and it being impossible to apply the proviso, the Court of Criminal Appeal had no alternative but to quash the conviction and enter a verdict of acquittal, although they might feel little doubt of the appellant's guilt and although in some cases it could be truly said that the appellant had never really been properly tried."

It is hardly surprising therefore that judges who have had experience of the work of the Court of Criminal Appeal have repeatedly drawn attention to the situation and have expressed regret that they had no power to order a new trial. Lord Goddard raised the question during the debates on the Criminal Justice Bill in 1948, and a clause was introduced into the Bill in the House of Lords, but later had to be dropped. A further debate took place in the House of Lords on May 8, 1952, on a motion by the Lord Chief Justice.

Now we have the benefit of this thorough investigation by a Departmental Committee, which had the advantage of hearing the views of a great number of distinguished and able persons, including a number of judges. It seems that a small majority of the Queen's Bench judges are in favour of the Court of Criminal Appeal having power to order a new trial. The Law Society were opposed to it, and the late Viscount Simon and the Bar Council thought that the power ought to be restricted to cases where there was fresh evidence, and believed that the risk of prejudice to the accused at any second trial was fatal to any wider power. The Committee point out that, apart from the evidence obtained from overseas, there is little that can be added to the arguments which have been canvassed on both sides of this question for many years. Of these arguments the Report contains a most able summary.

The Committee are all agreed that a limited power of granting a new trial in cases where there is fresh evidence would be desirable, and for this small mercy we must be duly grateful, although it should be noted that the need for such procedure in cases of fresh evidence is not one which arises very frequently, and the Report points out that even were retrials possible in such cases,

not all instances of the discovery of fresh evidence could be disposed of in this way. (See, for example, the special inquiries ordered in the cases of Rowland (1947) and Devlin and Burns (1952).) Further than this limited advance the majority of the Committee were not willing to go—and among their number were the Director of Public Prosecutions and the Head of the Criminal Division of the Home Office. They took their stand on what one may perhaps be forgiven for describing as pride and prejudice—pride in the principles of finality and speedy justice which are so dear to English lawyers, and fear of prejudice to the prisoner at the second trial. To the argument that there is already a departure from these ideals in cases where a jury has disagreed and there has to be a new trial, they reply by saying that it would be unwise to widen the exceptions, and there is some force in this view.

Three judges form the minority group on the Committee who are of the opinion that a power to order a new trial should be granted to the Court of Criminal Appeal. They are Lord Tucker, Sir Travers Humphreys and Judge Bass. In an able point-by-point reply to the objections, they deal very forthrightly with the points of principle and prejudice. They point out that "the administration of justice is not a game and it would occasionally be in the public interest that an accused person should have to undergo two trials before a verdict is properly reached, rather than that a guilty man, whose guilt or innocence has never been properly ascertained, should go free." They admit that in countries where the power to order a new trial exists, it has been very frequently exercised, but they do not consider that the high proportion of new trials which are ordered in successful appeals in other countries would be likely to be reproduced here if the power were given to the Court of Criminal Appeal. They are impressed with the fact that "in most parts of the Commonwealth the power to order a new trial in suitable cases is regarded by the Judges and legal opinion as essential to the administration of justice and does not appear to have aroused any public criticism."

It is at this point that the reader is forced to choose. He may favour change, or on the other hand he may prefer the *status quo*, fearing the consequences of the proposed innovation. The writer has not disguised his preference. It is possibly not without significance that the representatives of the legal profession who gave evidence and the practising members of the Committee preferred little or no change, whereas the judges on the Committee favoured the proposed innovation. In this context, at least, it might be better to have a judge-made law rather than one made by the legal profession.

J. E. Hall Williams.

NOTES OF CASES

Murder—Provocation and Drunkenness

The Problem of the Objective Test

It is not often that the Court of Criminal Appeal reserves judgment on a case, and when it decides to do so because "textbook writers think that the law on the question . . . is in a state of doubt", the case clearly deserves careful attention. When one adds that the case exemplifies a dilemma with which the criminal law is frequently faced and which goes to the root of the current debates on the subject, particularly in academic circles, the importance of the judgment will be realised.

The issue in *R.* v. *McCarthy* [1954] 2 W.L.R. 1044, was whether, in considering the question of provocation in relation to murder, the fact that a man was the worse for drink, and consequently more excitable and liable to lose control if provoked, could be taken into account. The facts were that the accused, having had a considerable amount to drink, got off a bus with the deceased, a man called Rees, and walked some little way with him. The appellant then said that, after they had gone up a side road, Rees committed an indecent assault upon him and invited him to commit an unnatural offence. This so provoked him that he "went raging", and hit Rees, whose body was found lying in the roadway, with severe injuries to the face and head consistent with having been battered repeatedly on the rough surface of the road.

The trial judge directed the jury that the assault and invitation, if in fact they occurred, could amount to provocation in the eyes of the law, but that the test to be applied by them in determining whether the crime of murder should be reduced to manslaughter was whether a reasonable man in consequence of the provocation received could be driven through transport of passion and loss of self-control to the degree and method and continuance of violence which produced the death. The appellant was convicted of murder, and appealed against conviction. The appeal was heard before the Lord Chief Justice and Hallett and Pearson JJ.

The appellant's counsel put up a strong argument in favour of the view that the reasonable man test ought not to be applied where the accused person was under the influence of drink. This argument was backed by reference to Mr. Turner's edition of Kenny (pp. 53 and 135) and by citation of a number of cases which appear to favour this view.[1]

[1] *R.* v. *Thomas* (1837) 7 C. & P. 817, 820; *R.* v. *Grindley* (1819) unreported, 1 Russell on *Crime*, p. 594; *R.* v. *Pearson* (1835) 2 Lewin 144; *R.* v. *Monkhouse* (1849) 4 Cox C.C. 55; *R.* v. *Mason* (1912) 8 Cr.App.R. 121, 125; *R.* v. *Hopper* [1915] 2 K.B. 431, 435.

The Court of Criminal Appeal declined to accept this argument, and held that there was ample authority for saying that the test to be applied was the effect of the provocation on a reasonable man. This was laid down in 1914 in *Lesbini*,[2] and had been affirmed by the House of Lords in *Beard's* case,[3] and the cases of *Holmes*[4] and *Mancini*.[5] Moreover it could be supported by reference to earlier cases.[6] Lord Goddard said the court could see no difference between a person who by temperament is unusually excitable or pugnacious and one who is temporarily made excitable or pugnacious by self-induced intoxication. "It may be that an excitable pugnacious or intoxicated person may be more easily provoked than a man of quiet or phlegmatic disposition, but the former cannot rely upon his excitable state of mind if the violence used is beyond that which a reasonable, or as we may perhaps say, an average person would use to repel an act which can in law be regarded as provocation."

The court pointed out, with the facts of the particular case in mind, that there might be nothing excessive in a simple blow "for the provocation might well merit a blow with the fist." However, a continued succession of blows or beating the other's head on the ground "would be quite another thing". "It is in our opinion now settled that apart from a man being in such a complete and absolute state of intoxication as to make him incapable of forming the intent charged, drunkenness which may lead a man to attack another in a manner which no reasonable sober man would do cannot be pleaded as an excuse reducing the crime to manslaughter if death results" (p. 1049).

It remains to consider whether this is a sound and sensible decision. It will be recalled that the reasonable man test which applies in the law of provocation was carefully examined by the recent Royal Commission on Capital Punishment (Cmd. 8932: September, 1953). Their conclusion was that there should be no change in this particular respect. Although there were cases where the test might appear severe, juries could be relied upon to ignore it in suitable cases and bring in a verdict of manslaughter (p. 53, § 145). Clearly this rule contradicts the notion of a subjective test for criminal liability; nevertheless it seems unlikely that anything can now be done to alter it, nor is it clear that any alteration is necessary. Viewed from the point of view of the theory of criminal liability, it cannot be regarded as satisfactory that a man who is intoxicated shall be measured by the standards of a sober person. Viewed from the point of view of the practical administration of the criminal law, it is impossible to conceive that the law

[2] [1914] 3 K.B. 1116.
[3] [1920] A.C. 479.
[4] [1946] A.C. 1.
[5] [1942] A.C. 1.
[6] *R.* v. *Carroll* (1835) 7 C. & P. 145; *R.* v. *Thomas* (1837) 7 C. & P. 817, at 819; *R.* v. *Stopford* (1870) 11 Cox C.C. 643.

could be otherwise. The survival of this objective test is explicable only on the grounds of policy, and judged by this criterion the decision is surely sound and sensible.

The Court of Criminal Appeal can take comfort from the fact that American courts have reached the same conclusion in relation to this problem. It has been said in the American courts that the reasonable man, in this context, "can only mean a sober man",[7] and that it would be out of the question for the courts to embark on a subjective inquiry. "In most matters what is usual and ordinary in any given society is the law of that society. All, therefore, must come up to the standard of the usual and ordinary, or take the consequences."[8] For the law to approve and adopt this attitude does not absolve it from its responsibility towards persons like McCarthy, but it is better for them to be dealt with by the prerogative of mercy rather than to alter the rule which requires the weaker members of society to strive to attain the standards of behaviour of the more average individuals. If the proposals of the Royal Commission relating to jury discretion were to be implemented, a case like this would be one in which the jury might well decide there were extenuating circumstances. It surprised no one that McCarthy was reprieved; his crime was clearly one of murder under extenuating circumstances. To say this is not quite the same as to hold that the law of provocation should be weakened by abandoning the objective standard.[9]

J. E. HALL WILLIAMS

THE RELATION BETWEEN THE PROVOCATION AND THE RESENTMENT

THE object of this further note is not to criticise the decision in the *McCarthy* case, but to suggest that certain dicta of the Lord Chief Justice should be treated with reserve if the doctrine of provocation is not to be circumscribed within undesirably narrow

[7] *Bishop* v. *United States* (1939) 107 F. (2d.) 297 (App.D.C.) cited in Michael and Wechsler (1940) 913.

[8] *Keenan* v. *Commonwealth* (1862) 44 Pa.St. 55, cited in Harno, *Cases and other Materials on Criminal Law and Procedure* (1933), p. 33.

[9] Since this note was written, the House of Lords has had the opportunity to consider this question, and their decision in *Bedder* v. *D. P. P.* [1954] 1 W.L.R. 1119 is wholly in agreement with the view taken by the Court of Criminal Appeal, as expressed in relation to McCarthy and again in relation to Bedder. The House has once more added the weight of its authority to the view that the test is an objective one, and although there is really nothing new in the speech of Lord Simonds, it is interesting for its express recognition, at page 1123 of the report, that the purpose of the test "is to invite the jury to consider the act of the accused by reference to a certain standard or norm of conduct." It is with this object that the "reasonable" or the "average" or the "normal" man is invoked, says Lord Simonds, and he makes it clear that if the reasonable man were deprived in whole or in part of his reason or the normal man were endowed with abnormal characteristics, for the purpose of measuring the accused's conduct in accordance with the rule, which was the suggestion made by the appellant's counsel, the test would cease to have any value.

limits. Lord Goddard said: " The only question for the jury was whether the violence used by the appellant as a result of the provocation could possibly be excusable, as it is undoubted law that the violence used must have some reasonable relation to the provocation. While this provocation would no doubt have excused (when we say " excused " we mean enough to reduce the killing to manslaughter) a blow, perhaps more than one, it could not have justified the infliction of such injuries as to cause three or four fractures of the skull and the beating of the man's head on a stony road." And later in his judgment: " If a man who is provoked retaliates with a blow from his fist on another grown man a jury may well consider and probably would that there was nothing excessive in the retaliation even though the blow might cause the man to fall and fracture his skull, for the provocation might well merit a blow with the fist. It would be quite another thing, however, if the person provoked not only struck the man but continued to rain blows upon him or to beat his head on the ground as happened in the present case."

These remarks seem to suggest that there must, as a matter of law, be a reasonable relationship between the acts constituting the provocation and those causing the death. As there is now a fair amount of authority in support of this (*e.g.*, *R.* v. *Gauthier* (1943) 29 Cr.App.R. 113, *R.* v. *Duffy* [1949] 1 All E.R. 932, and *Att.-Gen. for Ceylon* v. *Don John Perera* [1953] A.C. 200) it may be well to examine the basis on which it rests before it becomes fully established by mere repetition.

The source of this suggestion appears to be some remarks of Lord Simon L.C. in *Mancini* v. *D. P. P.* [1942] A.C. 1: " The test to be applied is that of the effect of the provocation on a reasonable man. . . . In applying the test, it is of particular importance (a) to consider whether a sufficient interval has elapsed since the provocation to allow a reasonable man time to cool, and (b) to take into account the instrument with which the homicide was effected, for to retort, in the heat of passion induced by provocation by a simple blow, is a very different thing from making use of a deadly instrument like a concealed dagger."

It is submitted that Lord Simon was not laying these down as requirements of law, but as points to be considered by the jury in deciding whether the accused really had been provoked. He is not laying them down as *tests* of manslaughter, but as points to be borne in mind in *applying the test*. The judgment of the same learned lord in *Holmes* v. *D. P. P.* [1946] A.C. 588 seems to point the same way, for he there lays down the requisites for the doctrine as follows: " If . . . the case is one in which the view might fairly be taken (a) that a reasonable person in consequence of the provocation received, might be so rendered subject to passion or loss of control as to be led to use the violence with fatal results, and (b) that the accused was in fact acting under the stress of

such provocation, then it is for the jury to determine whether on its view of the facts manslaughter or murder is the appropriate verdict." No further requirements of law are mentioned.

Moreover, there is old authority which is clearly inconsistent with this alleged requirement of reasonable relationship between the provocation and the acts causing death. The standard example of provocation is the case of the person who finds his or her spouse committing adultery. Nobody has ever suggested that the defence depends on *how* the spouse is killed. Again, in the well-known case of *R.* v. *Hayward* (1833) 6 C. & P. 157, Tindal C.J. allowed the question of manslaughter to go to the jury although the accused had stabbed the deceased with a butcher's knife when the only provocation was a quarrel in which the accused had been kicked by the deceased.

The second passage cited above from the judgment of Lord Goddard is particularly open to objection in that it is almost tantamount to ruling that as a matter of law a blow with the fist can never be provocation. It is true that Lord Goddard says that such a blow would be provocation if the accused merely retaliated with a similar blow and the deceased fell and fractured his skull. But, with the greatest respect, this is an extraordinary proposition, for the accused in such a case would not be guilty of murder even in the absence of any provocation. In other words, if this dictum is correct no act can ever be provocation unless it is itself potentially lethal (or very nearly so)—a revolutionary proposition.

It is especially surprising that Lord Goddard should take so stringent a view of the law of provocation on this question in view of his recent categorical pronouncement (in *Att.-Gen. for Ceylon* v. *Don John Perera* [1953] A.C. 200, at 206) that "The defence of provocation may arise where a person *does intend to kill** or inflict grievous bodily harm but his intention to do so arises from sudden passion involving loss of self-control by reason of provocation." If the law is prepared to allow the doctrine to operate where the accused does intend to kill why should it be so particular as to the methods he chooses in carrying out his intention? Moreover, once granted that the provocation might be sufficient to reduce the killing to manslaughter, the question whether there is a reasonable relationship between the provocation and the accused's act seems to have been already answered. The law has said, *ex hypothesi*, that the act of killing is reasonably related to the provocation. Can it matter how the killing is done?

P. S. ATIYAH.

* My italics. On the apparent conflict between this dictum and Lord Simon's opinion in *Holmes* v. *D. P. P.* [1946] A.C. 588, see Edwards, 69 L.Q.R. 547.

Reasoning, Ratio Decidendi and Denning L.J.

"It may be that the principle of *Cackett* v. *Cackett* is that a *ratio decidendi* may be rejected by a court otherwise bound by it, if the reasoning on which it was based has been declared to be faulty by a court superior to that pronouncing the *ratio decidendi*." This comment was made some years ago [1] and is recalled because the principle stated in it is the basis of the judgment of Denning L.J. in *Bonsor* v. *Musicians' Union* [1954] 2 W.L.R. 687.

In *Cackett* v. *Cackett* [1950] P. 253, Hodson J. refused to follow a *ratio decidendi* of the Court of Appeal in *Cowen* v. *Cowen* [1946] P. 36, because the reasoning in *Cowen* v. *Cowen* had been shown to be faulty by the House of Lords in *Baxter* v. *Baxter* [1948] A.C. 274. He said: "The whole foundation of the conclusion arrived at by the Court of Appeal in *Cowen's* case having been destroyed, in my judgment, the conclusion also is destroyed." This doctrine was opposed to the view generally entertained that the authority of a *ratio decidendi* was not affected by a demonstration that the reasoning on which it was based was unsound: this view can be summarised in Goodhart's epigram "a bad reason may often make good law." The doctrine planted by Hodson J. appeared likely to wither away, but Denning L.J. has now "watered" it, and it remains to be seen what further nourishment it will receive.

Before discussing the judgment of Denning L.J. two logical points must be made. The first is a terminological one. I use *ratio decidendi* to mean the rule of law which forms the basis of a judge's decision (*i.e.*, ultimate order) and which is to be found in the opinion he has expressed. This is the sense in which it is used by English judges from Lord Campbell onwards. In *Att.-Gen.* v. *Dean and Canons of Windsor* (1860) 8 H.L.C. at 391, he describes a *ratio decidendi* as the rule "propounded and acted upon in giving judgment." Much confusion has resulted from the existence of another usage among legal writers. This usage is illustrated by Salmond's definition:—"the underlying principle which . . . forms its authoritative element is . . . the *ratio decidendi*. . . ."

The second point has recently been the subject of correspondence in *The Times*, beginning with Professor Ayer's letter of May 7, 1954. As he said: "A hypothesis is falsified if it has false consequences: but to assume the converse is to commit a fallacy. It is by no means necessary that if a hypothesis is false its consequences are." While this is true it is also true that if the ground for accepting a proposition as true is that it follows from a "hypothesis," then if the "hypothesis" be falsified some other reason must be found for accepting the proposition as true. There is no fallacy in a doctrine which deprives a *ratio decidendi* of binding authority when the reasons upon which it was based are shown to be unsound.

[1] 2 Western Australia L.R. at p. 317.

In *Bonsor* v. *Musicians' Union* the plaintiff sought to obtain damages from a trade union whose secretary had without proper authority excluded him from membership of the union. Sir Raymond Evershed M.R. and Jenkins L.J. in the Court of Appeal held they were bound by decision of an earlier Court of Appeal in *Kelly* v. *National Society of Operative Printers and Assistants* (1915) 84 L.J.K.B. 2236, which in their view could not be distinguished, and to which none of the reservations laid down in *Young* v. *Bristol Aeroplane Co.* applied. The relevant *ratio decidendi* of *Kelly's* case was that a member of a trade union could not obtain damages for a wrongful act done to him by officials of the union in his capacity as member of the union. In *Kelly's* case there had been a wrongful resolution of a branch committee, but the fact that in *Bonsor's* case there was wrongful action by a secretary did not constitute a significant distinction. There were decisions of the House of Lords that a member of a trade union could obtain a declaration and an injunction against the trade union, but despite the puzzlement about this expressed by Scrutton L.J. in *Ex p. Malone* [1921] 2 K.B. at 709, this did not mean that *Kelly's* case could not "stand with" principles accepted in the House of Lords. Indeed in *Kelly's* case itself the Court of Appeal had granted a declaration and an injunction though it refused to grant damages. Moreover, there was no conflict between *Kelly's* case and the decision of the Court of Appeal in *National Union of General and Municipal Workers* v. *Gillian* [1946] K.B. 81, a case which had been overlooked by counsel: that was an action brought by a trade union against a non-member. It was true that the reasoning in *Kelly's* case and the merits of its *ratio decidendi* had been judicially doubted, but the *ratio decidendi* remained binding: reasoning and merit were not relevant to authority. This is brought out by Lord Sterndale's comment on *Kelly's* case: "I do not think it necessary to go into the reasons which the court gave for its decision. That is the law until the House of Lords alters it." (*Ex p. Malone* at 702).

The thesis underlying the judgment of Denning L.J. is that, apart from *Kelly's* case, the principles of law contained in the authorities which he reviewed supported the plaintiff's claim for damages. Nor was the court bound by *Kelly's* case. In coming to this latter conclusion he does put forward a suggestion of relying on one of the reservations in *Young* v. *Bristol Aeroplane Co.*, *viz.*, the exception that an earlier decision given *per incuriam* is not binding. The court in *Kelly's* case did not have the benefit of a full argument from counsel on the question whether damages could be obtained. Such a reason for not following a precedent is, however, a very wide extension of the reservation in *Young's* case and of the doctrine that precedents *sub silentio* are not binding, and it is not really regarded by Denning L.J. as adequate in itself. After propounding it he continues: "Furthermore, the court proceeded on four assumptions which later cases had shown to be

wrong." Then after his demonstration of this proposition he concludes, "*Kelly's* case is based on four assumptions which were made without full argument, and which subsequent decisions of this court and of the House of Lords have shown to be fallacious." It may well be that Denning L.J. considers that both absence of full argument and demonstration of faulty reasoning must co-exist if a *ratio decidendi* is not to be regarded as binding. At any rate, the *ratio decidendi* of his judgment includes both factors.

Nevertheless, it is to be hoped, assuming that the doctrine of *stare decisis* remains, that the general principle adopted by Hodson J. in *Cackett* v. *Cackett* will be accepted, and indeed will be extended, in the manner hinted at by Denning L.J., to cover cases where the demonstration of the faulty reasoning leading to a *ratio decidendi* is made by a court whose jurisdiction is co-ordinate with that of the court which pronounced the *ratio decidendi*. Such a doctrine is a reasonable extension of the reservation in *Young's* case that a court is not bound by a precedent given *per incuriam*. The Court of Appeal in the instant case, I, is not bound by a decision of the Court of Appeal in a precedent case, P, where P was given *per incuriam*. Should it be bound by a subsequent decision, S, based on the authority of P, even if a judgment, C, later than S, has shown the error in P? To answer "yes" appears to attach too much weight to *communis error*, and to make the authority of a case depend on the date of the detection of an error.

J. L. MONTROSE.

THE LIABILITY OF REQUISITIONING AUTHORITIES FOR DEFECTIVE PREMISES

THE recent decision of the Court of Appeal in *Greene* v. *Chelsea Borough Council* [1954] 3 W.L.R. 12, raises a number of interesting problems in the law relating to liability for defective premises. The law before this case may, for the purposes of this note, be summarised as follows: (1) An owner out of occupation may become liable to persons outside the premises in nuisance, and, subject to the principle of *Cavalier* v. *Pope* [1906] A.C. 428, to any person for negligence. (2) An occupier, whether he is owner or not, may become liable to persons outside the premises in nuisance and under the rule in *Rylands* v. *Fletcher* (1868) L.R. 3 H.L. 330, and to any person for negligence; special rules apply where a person is injured on the premises by reason of a defect in them, the occupier's duty varying in stringency with the character of the entrant. The two main questions which arise from *Greene's* case are (a) the extent of the exemption from liability for negligence created by *Cavalier* v. *Pope*; and (b) the meaning of "occupier" within the second proposition set out above.

The facts of the case must be stated in some detail. The defendant council, acting under regulation 51 of the Defence (General)

Regulations, 1939, requisitioned a house to provide accommodation for the homeless. In March, 1949, the council wrote to the plaintiff's husband, Greene, offering him accommodation in the house. An assessment form was filled up, stating that the accommodation was required for Greene, his wife and their three children. An agreement was drawn up in April, 1949, between the council (who were stated to have the "control and management" of the house) and Greene (who was described as the "occupier"), by which the council gave its "licence and authority for the occupier to occupy" part of the house. Greene undertook to allow the council to enter and examine the premises "at all reasonable times of the day" and to allow it to effect any repairs which it might consider necessary. In May, 1951, the plaintiff reported that there was a crack in the kitchen ceiling. Two of the council's workmen came to inspect the ceiling, and after inspection said that it was "all right." Nothing further was done until, in December, 1952, the ceiling fell on the plaintiff "without any warning" (at p. 16). The plaintiff claimed damages for negligence. The Court of Appeal held that her claim succeeded.

The defendants relied mainly on *Cavalier* v. *Pope*. Singleton L.J. distinguished that case on the ground that there was no relationship of landlord and tenant between the council and the occupier since (i) the council, as requisitioning authority, had no power to grant a tenancy of requisitioned premises: *Southgate Borough Council* v. *Watson* [1944] K.B. 541; and (ii) there was no intention to create a tenancy. As there was no tenancy, the defendants were "under a duty to act reasonably in regard to all those for whom accommodation is found" (at p. 18). Since the plaintiff was mentioned in the assessment form she was one of the persons to whom the duty was owed, even though the occupation agreement was made with the husband alone. It appears that Singleton L.J. held the defendants liable on the ordinary principles of negligence. His narrow interpretation of *Cavalier* v. *Pope* will be universally welcomed. While the doctrine of that case may be justifiable where a prospective tenant or purchaser has an opportunity to survey the premises, it tends to work hardship where there is no such opportunity (*cf. Cruse* v. *Mount* [1933] Ch. 278). Such hardship would clearly have arisen had the doctrine been extended to this case.

The judgments of Denning and Morris L.JJ. are based on a different ground. Since there was no tenancy, the Greenes were licensees and the council a licensor. Hence the council was liable as it was in breach of the duty owed by an occupier to licensees. Apart from this agreement as to the general approach, the two judgments differ in many important respects: (i) Denning L.J. said that the duty was "to take reasonable care to prevent damage through want of repair" (at p. 21); Morris L.J. said that the duty was "to warn their licensees of that danger" of which the council knew through their agents (at p. 23). With respect, Morris L.J.'s

is the more orthodox formulation of an occupier's duty to a licensee. (ii) Denning L.J. said that the duty was owed "to every person lawfully on the premises" (at p. 21); Morris L.J. said that it was owed by the council to "their licensees"—a formulation which seems to exclude licensees of the licensees. (iii) Both the learned Lords Justices felt some difficulty about the fact that the plaintiff knew that there was a crack in the ceiling, but each met the difficulty in a different way. Denning L.J. said that notice of the defect was "only a bar in so far as the party is free to act upon it" (at p. 22) and distinguished *London Graving Dock Co.* v. *Horton* [1951] A.C. 737 (which in his view applied to licensees) on the ground that the plaintiff's freedom to act in that case was curtailed by a contract with his employers, which, so far as the defendants were concerned, was *res inter alios acta*. Morris L.J. said that notice did not defeat the plaintiff's claim, since "It was not for her to determine whether that state of affairs constituted a danger or not" (at p. 23). In other words, notice of a defect is not notice of the danger to an ordinary person when only an expert would appreciate that the defect was dangerous. The interesting inference may be drawn that, where a person has notice of a defect which would convey notice of the danger to a reasonable man, he has no right of action against the occupier. The principle in *Hawkins* v. *Coulsdon & Purley U.D.C.* [1954] 1 Q.B. 319 may work against, as well as in favour of, the licensee.

Interesting as all this diversity of opinion is, it is submitted with the greatest respect that the principles which govern the liability of an occupier to entrants had no application in this case, since the defendants were not the occupiers of the defective part of the premises. A person who gives a licence to enter of course remains in occupation, but one who gives a licence to occupy himself ceases to be the occupier (except in cases of joint occupation) when the licensee enters into occupation. In our case the licence was a licence to occupy. The occupation agreement throughout referred to the plaintiff's husband as the "occupier," and the plaintiff's family in fact occupied the flat. It will not do to say that the defendants "were in law in possession of the house" (at p. 21). They were not in fact in occupation of the defective part of the premises; and it is occupation in fact which generates liability in cases of this kind (see *Cavalier* v. *Pope*, *supra*, at p. 431). Nor does the fact that the occupier cannot exclude the owner turn the owner into an occupier: *Hartwell* v. *Grayson, etc. Dock, Ltd.* [1947] K.B. 901, 915; in any event, in the present case the defendants could not enter the premises at any time but only "at all reasonable times of the day," so that the licensees had some power of excluding the defendants from the premises. Nor did the defendants' right to enter and repair turn them into occupiers: if it did, every landlord who reserved such a right, or who covenanted to repair, would be

the occupier of the demised premises; yet this suggestion was expressly repudiated in *Cavalier* v. *Pope*.

It is submitted that to hold the defendants liable on the footing that they were occupiers is not only inconsistent with authorities binding on the Court of Appeal, but also undesirable. Had the defendants not actually known of the defect they would on this basis have escaped liability. If the case is regarded as an ordinary case of negligence, they would have been liable even if they did not know of the defect, so long as they should have known of it. The approach of Singleton L.J. is, it is submitted, preferable to one which involves a distortion of the meaning of the word "occupier" and an extension not only of the duties but also of the privileges of a non-occupier.

G. H. TREITEL.

RELATIONSHIP OF BANKER AND CUSTOMER

Arab Bank, Ltd. v. *Barclays Bank (Dominion, Colonial and Overseas), Ltd.* is an important case in banking law. Part of Parker J.'s judgment is reported in [1952] W.N. 529; [1952] 2 T.L.R. 920; the judgments in the Court of Appeal in [1953] 2 Q.B. 527; [1952] 2 All E.R. 263; and the opinions in the House of Lords in [1954] 2 W.L.R. 1027, [1954] 2 All E.R. 226. The main question of law involved was the effect of the outbreak of war on a current account with a bank.

Briefly, the material facts were as follows. In 1939 the plaintiffs, Arab Bank, Ltd., whose registered office was in Jerusalem, opened a current account with the Jerusalem branch of the defendants, Barclays Bank (Dominion, Colonial and Overseas), Ltd., whose registered office was in England. Palestine was British mandated territory until the mandate expired at midnight on May 14, 1948, and simultaneously with the termination of the mandate the Provisional Council of State and Provisional Government of the State of Israel were constituted. Prior to that date there had been serious disturbances in Jerusalem, and it seemed likely that open hostilities between Jews and Arabs would soon break out. It was originally part of the plaintiffs' case that before the termination of the mandate they had demanded payment of the balance standing to the credit of their account with the defendants and that the defendants had refused or failed to pay in accordance with that demand. The plaintiffs, therefore, claimed that they had a right of action against the defendants for the sterling equivalent of the balance. The defendants, on the other hand, denied that there had been any demand for the repayment of the balance, and Parker J. found as a fact that no demand had been made. This finding of fact was not challenged either in the Court of Appeal or in the House of Lords. The plaintiffs accordingly failed on this part of their claim.

It is interesting to note, however, that Parker J. considered the defendants' argument that such a demand must be in writing. This part of his judgment does not appear to have been reported. The following extract from the transcript is, therefore, quoted verbatim; it will be noted that it cites an illuminating definition of "banking business" contained in a Palestine Ordinance. Parker J. said: "The defendants contended that a demand, the non-compliance with which would amount to a breach, must be in writing, and they relied on the Palestine Banking Ordinance No. 26 of 1941. In that Ordinance 'banking business' is defined as meaning 'the business of receiving from the public on current account money which is to be repayable on demand by cheque.' In my view, however, it does not follow from this definition that there cannot be a breach of an oral demand. Quite apart, however, from this Ordinance it was contended that under English law, which in this respect was incorporated in the law of Palestine, a written demand is necessary. There is no express authority on the point, and the question was specifically left open by Atkin L.J., as he then was, in *Joachimson* v. *Swiss Bank Corporation* [1921] 3 K.B. 110 at p. 127, where after defining the relation of banker and customer on current account he added 'Whether he must demand it in writing it is not necessary to determine.' Equally, it is not necessary for me to determine the question, and I would only say that as at present advised I see considerable difficulties in accepting the defendants' contention. The necessity for a demand at all only results from implying a term, and there seems little necessity in going further and implying that such demand must be in writing."

To return to the events in Palestine, the defendants closed their Jerusalem branch on May 13, 1948, and it was occupied on May 14 by irregular Jewish forces. On May 15 the building was taken over by the regular Israeli forces. Thereafter it remained at all times under the control of Israel, and the branch was not reopened until July, 1950. Before the end of the mandate at midnight on May 14, 1948, the plaintiffs had closed all their branches operating in Israeli territory. Immediately on the determination of the mandate war broke out between the State of Israel on the one hand and the Arabs in Palestine and certain States which supported them on the other hand. The State of Israel then passed certain legislation, one effect of which was to vest in an official called "the Custodian of the Property of Absentees" the property in the State of Israel of "absentees," a term which included, in general, any person owning property in Israel who, on or after November 29, 1947, had gone outside Israel. The legislation provided that where the property was in the form of a debt, or an indebtedness due to the absentee, the person indebted should pay the sum to the custodian. The plaintiffs wrote to the defendants claiming payment of the balance of their account by its transfer to their account

with a bank in London. The defendants refused to make the transfer, pointing out that the Jewish authorities who were in *de facto* control of the area in which the branch was situated would not permit transfer or payment of balances outside territory occupied by them, without their proper authority. On October 9, 1950, the plaintiffs issued their writ. A few months later on February 8, 1951, in response to a request by the custodian to deliver to him all the moneys which they held in the account of the plaintiffs, the defendants paid to the custodian the sum of 582,931·146 Palestine pounds.

The main argument which was advanced on behalf of the plaintiffs in the Court of Appeal and in the House of Lords, was that upon the outbreak of war the contract between the plaintiffs and the defendants was wholly destroyed, and with it was destroyed the right of the plaintiffs to payment of their balance in accordance with that contract. Thereupon there arose, by operation of law, a new right in the plaintiffs to have the amount of their balance repaid to them as money had and received by the defendants for a consideration which had wholly failed. This new right, being wholly independent of the contract between the parties, was free from the two limitations imposed upon the current account, *viz.*, that the defendants were only bound to repay it (1) after demand made, and (2) at the Jerusalem branch. The sum in question became a "simple debt" owing from the defendants to the plaintiffs; that debt was locally situate at the "administrative centre" of the defendants (*i.e.*, London), and the plaintiffs were entitled to claim repayment in London.

In developing this argument, counsel for the plaintiffs referred to the well-known case of *Joachimson* v. *Swiss Bank Corporation* [1921] 3 K.B. 110, in which the Court of Appeal held that where money is standing to the credit of a customer on current account with a banker the making of an actual demand is a condition precedent to the bringing of an action to recover such money. No demand having been made for the balance at the defendants' branch in Jerusalem before the outbreak of war, there was no accrued right to sue for the balance and no debt owing by the defendants to the plaintiffs. The basic consideration for leaving the money on current account was the provision of banking services *in futuro*. The contract was still executory on May 14, 1948, but on the outbreak of war the further performance of banking services became illegal. Thus the contract was frustrated on the outbreak of war by supervening illegality. Thereupon, by operation of law and not by contract a new obligation arose, namely, an obligation on the defendants to refund to the plaintiffs the amount by which they had been unjustly enriched by reason of the frustrated contract. That obligation arose immediately the contract was frustrated: *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe*

Barbour, Ltd. [1943] A.C. 32. It followed from this argument that the custodian was not entitled to demand payment, and the defendants were under no obligation to pay him. The fact that they did so was *nihil ad rem.*

This argument was rejected by Parker J. and by all the judges in the Court of Appeal and the House of Lords. Space will only permit reference to two of the opinions delivered in the House of Lords. The first speech was that of Lord Morton of Henryton, who relied very largely on the earlier decision of the House of Lords in *Schering, Ltd.* v. *Stockholms Enskilda Bank Aktiebolag* [1946] A.C. 219, a case of a debt payable by future instalments in which it was held that the obligation to pay on outbreak of war was only suspended. Referring to that decision Lord Morton said : "Having regard to this decision, I do not think that the right which was vested in the appellants at the outbreak of war can be held to have been destroyed merely because no action could be brought to recover it without a previous demand. . . . I do not attempt the task of formulating an exhaustive description of the rights which do and the rights which do not survive the outbreak of war; but I am quite satisfied that the right to be paid a credit balance on a current account is a right which survives. . . . It was therefore suspended, and not destroyed, by the outbreak of war, and immediately after the outbreak of war it was locally situate in the newly created State of Israel. Thus it became subject to the legislation of that State, was vested in the custodian, and was rightly paid to the custodian by the respondents. There was a difference of opinion in the court below as to whether the necessity for a demand survived the outbreak of war. I incline to the view that it did, but I do not regard a decision on this question as being necessary for the decision of this case."

Lords Reid, Asquith of Bishopstone, and Cohen delivered opinions in which they followed the same line of thought as Lord Morton. Lord Tucker, however, reached the same result by a somewhat different route. His Lordship, in a short but illuminating speech, said that the law with regard to the effect upon contracts of frustration due to war is based upon public policy. He continued by asking : "How does public policy require the special relationship existing between banker and customer in respect of the balance standing to the customer's credit on current account to be treated? It is true that this relationship requires a formal demand by the customer before his rights crystallise into a cause of action, but what is there in the requirements of public policy that necessitates a distinction being drawn between the case where the customer has made formal demand a moment before the outbreak of war and one where he has not gone through this formality? In both cases there is standing to his credit a sum of money which before war was for all practical purposes as valuable to him as if it

were cash in his own safe, and in each case the outbreak of war makes payment illegal. In one case is there to be suspension and in the other confiscation? . . . I do not consider that the answer to these questions is to be found by a minute examination of the precise language used by noble Lords in previous cases in dealing with different facts, but rather by endeavouring to discover the broad general principles of public policy upon which those decisions were based and then applying them to the special creditor and debtor relationship existing between banker and customer. So judged, I can find no valid distinction from the point of view of public policy between the one kind of obligation and the other."

Before parting with this case, one may say that it certainly strengthens the arguments of those who maintain that time and expense would be saved if a " leap-frog " procedure was introduced whereby certain appeals, if certified as suitable by the trial judge on application to him, could go direct to the Lords, a proposal which was discussed recently in this *Review* by Professor L. C. B. Gower in his article on " The Cost of Litigation " : 17 M.L.R. 1–23. It must have been obvious from an early stage that the parties in this case would wish to take the matter to the highest tribunal.

J. Milnes Holden.

Recognition of Foreign Divorces: The Effect of Travers v. Holley

It is a waste of time to criticise a decision of the House of Lords, the effect of which is manifestly desirable, on the ground that it is legally incorrect. But it is otherwise in the case of a Court of Appeal decision, if it can be challenged under any of the qualifications in the rule in *Young* v. *Bristol Aeroplane Co. Ltd.*[1] Such a decision leaves the law in a debatable state until it is settled either by legislation or by the House of Lords. This is the justification for further discussion of *Travers* v. *Holley*,[2] the effect of which most people would agree to be desirable.

In his note on *Travers* v. *Holley*[3] Dr. Mann refers to *Le Mesurier* v. *Le Mesurier*[4] as a decision of the House of Lords. He argues that since in *Travers* v. *Holley* the Court of Appeal " departed from a fundamental decision of the House of Lords,"[5] the case is an emphatic assertion of the maxim *cessante ratione cessat lex*. But *Le Mesurier* v. *Le Mesurier* was in fact a decision of the Judicial Committee. It is submitted, however, that the court did indeed " depart from a fundamental decision of the House of Lords."

1 [1944] K.B. 718.
2 [1953] P. 246.
3 17 M.L.R. 79.
4 [1895] A.C. 517.
5 At p. 81.

Le Mesurier's case is not really authority for the proposition which the Court of Appeal (with Dr. Mann's approval) based upon it. It was a decision of the Judicial Committee (on appeal from Ceylon) that the courts of Ceylon had no jurisdiction to decree a divorce where the parties were not domiciled in Ceylon. It was a decision by a court on the question of its own jurisdiction; it was *not* a decision on the question of the jurisdiction of the foreign court.

In *Travers* v. *Holley* the court had to decide whether to recognise a decree made in New South Wales under legislation similar to section 18 of the Matrimonial Causes Act, 1950, the parties being domiciled in England. The decision to recognise the decree was made as a deliberate departure from a principle supposed to be found in *Le Mesurier* v. *Le Mesurier*. Somervell and Hodson L.JJ. both cited a dictum of Lord Watson in that case

> "A decree of divorce *a vinculo*, pronounced by a court whose jurisdiction is solely derived from some rule of municipal law peculiar to its forum, cannot, when it trenches upon the interests of any other country to whose tribunals the spouses were amenable, claim extraterritorial authority." [6]

Both learned judges pointed out that in the case before them the New South Wales court was not "exercising a jurisdiction solely derived from some rule of municipal law peculiar to its forum" (since the *lex domicilii* had a similar rule) and that therefore Lord Watson's dictum did not apply.

The dictum referred to was pronounced by Lord Watson as a principle contrasting with one enunciated by Lord Westbury in *Shaw* v. *Gould* [7] to the effect that a foreign court has jurisdiction to divorce persons domiciled in its country. It is surprising that, with this latter dictum before them, the learned judges apparently did not realise that in *Shaw* v. *Gould* the House of Lords decided that a foreign decree would not be recognised where it was pronounced by a court other than that of the domicile. In other words, they successfully distinguished a dictum in a case which was not in point and not binding on them, but ignored a case which was both binding on them and directly contrary to what they decided. Dr. Mann's account of the decision in *Le Mesurier's* case is quite incorrect, but is a correct account of the decision in *Shaw* v. *Gould*; and the Court of Appeal fell into the same error.

It may be argued that there is already a well-known exception to the *Shaw* v. *Gould* principle, namely, the rule in *Armitage* v. *The Attorney-General*,[8] which case was also decided apparently without consideration of *Shaw* v. *Gould*. This in itself would be a very feeble argument in favour of *Travers* v. *Holley*; but it is submitted that there is a clear distinction. The purpose of the English conflict of laws rules in this matter is presumably to ensure,

[6] Somervell L.J. at p. 251; Hodson L.J. at p. 256.
[7] (1868) L.R. 3 H.L. 55.
[8] [1906] P. 135.

as far as possible, the supremacy of one law in matters involving personal status, namely the *lex domicilii*. That is the justification for the rule in *Shaw* v. *Gould*, and it is also the justification for the rule in *Armitage* v. *The Attorney-General*, for this purpose would be defeated if English law refused to recognise any divorce which was recognised by the *lex domicilii*. The decision in *Travers* v. *Holley*, however, does not make for uniformity between English law and the *lex domicilii*, but for uniformity between English law and a foreign law at the expense of the supremacy of the *lex domicilii*. To say that the legislature has already made an inroad upon the supremacy of the *lex domicilii*, by enacting section 18 of the Matrimonial Causes Act, 1950, may be a valid argument for further legislation, but can hardly establish the correctness of *Travers* v. *Holley*.

Two questions arise. First, can *Travers* v. *Holley* be challenged in the Court of Appeal? It is submitted that it can be so challenged, under the rule in *Young* v. *Bristol Aeroplane Co. Ltd.*, either because it "cannot stand with" *Shaw* v. *Gould* or because it was decided *per incuriam*, *Shaw* v. *Gould* apparently not having been cited to the court, and the court apparently not having realised that it was relevant.

Secondly, would an Australian court be able to return the compliment by coming to a conclusion similar to that of the Court of Appeal in *Travers* v. *Holley*—in other words, using Australian legislation similar to section 18 of the Matrimonial Causes Act, 1950, as the reason for recognising an English divorce granted under that section? It is submitted that this would be impossible. Since *Piro* v. *Foster*,[9] Australian courts have been bound to prefer a House of Lords decision to a conflicting decision of the High Court of Australia itself. They could hardly decline to be bound by *Shaw* v. *Gould* when no Australian decision conflicts with it.

These conclusions are regrettable, but it is submitted that the only remedies are either confirmation of *Travers* v. *Holley* by the House of Lords, or further legislation.

R. A. Blackburn.

The Finality of Settlements

In *Chapman* v. *Chapman* [1954] 1 All E.R. 798, the House of Lords finally rejected the idea that the Chancery Division had a wide inherent jurisdiction to sanction on behalf of children or unborn persons modifications of trusts solely on the grounds that such a modification might be beneficial to those persons. It was admitted (*per* Lord Simonds at p. 802) that there were four heads under which the court had jurisdiction to alter settlements. It could authorise a change in the nature of an infant's property. It could, in the

[9] (1943) 68 C.L.R. 313.

absence of any provision in a settlement, authorise maintenance of an infant. It could, by way of salvage, authorise some business transaction not provided for in the trust, a power which is apparently only to be used where the necessity is great (*per* Lord Asquith at p. 819). Finally, it could sanction a compromise affecting the interests of infant and unborn beneficiaries. It had been asserted in argument, and in the court below by Denning L.J., that these four heads were mainly manifestations of a general power of the court, and particular reliance was placed on cases under the fourth head where arrangements had been sanctioned which could hardly be regarded as the compromise of a dispute. This argument the House of Lords rejected, by a majority, holding that the existence of the general principle could not be deduced simply as a convenient link for the four instances. As to cases under the fourth head, it was held that the word "compromise" must be understood in a precise and narrow sense, limited to cases where beneficial interests are in dispute. This interpretation was even more restrictive than that of the majority of the Court of Appeal, and the opinion was expressed that in the trilogy of cases reported under the heading *Re Downshire's Settled Estates* [1953] 1 All E.R. 103, the Court of Appeal had erred in finding a compromise in *Re Blackwell* and *Re Downshire*. Certainly it had been difficult to find any satisfactory way of distinguishing the three cases and the present principle has at least comprehensibility to commend it.

That it has a marked restrictive effect on past practice cannot be denied. This effect is marked by *Re Harrison's Share, Harrison* v. *Harrison* [1954] 3 W.L.R. 156, in which Roxburgh J. recalled, in the light of the House of Lords' decision, an order which he had made in conformity with past practice, but which order had not been drawn up at the date of the House of Lords' decision. At first sight indeed the result might appear unduly restrictive. That impression must, however, be reviewed against two considerations. It must be remembered that what was here sought was sanction to a rearrangement of interests which would save death duties. It was not a case where interests were in dispute, or where the settlement did not carry out the settlor's intent. All that had happened was that the precise effect of the limitations adopted had not been appreciated with the result that more duty would be payable than if others had been chosen. In days of heavy taxation it is no doubt reasonable for individuals to seek to minimise their liability, and natural for them to feel disappointed if an attempt to do so turns out to be less successful than had been hoped, either because of an original misapprehension or because of a subsequent change of the law. It does not follow that the courts ought to afford the means by which an individual can by a process of trial and error obtain optimum results, and the existence of a settlement does not in itself afford any additional argument for doing so. So long as an individual

retains free control over his funds he will, during his lifetime (or at least up to five years before his death), be able to marshal them so as best to attain his aim of minimum taxation, but his control is limited to his lifetime. If he chooses an alternative, of settlement, he can do something to achieve that purpose; he can also attain another object—that of prolonging his control over the funds in question. That prolongation can only be attained at the expense of some of his freedom to dispose of his assets. In effect, the present decision merely means that the courts will not help settlors to get the best of both worlds. The settlor cannot prolong his control, and at the same time be confident of preserving freedom for manoeuvring the settled funds through an application to the court for a rearrangement of the settlement when movements of the law make that desirable in order to save duty. It is not unreasonable that as a price for prolonging this control the settlor should lose some of that freedom. Moreover, granted the readiness of Parliament to close, by legislation, gaps in the revenue laws there is much to be said for preventing what Lord Morton called "an undignified game of chess between the Chancery Division and the legislature." Indeed, it can hardly be said that it is among the primary purposes of the courts to provide machinery for relieving individual taxpayers from the consequences of their forebears' lack of foresight or for enabling them to circumvent legislation.

Apart from the revenue aspect the admission of this inherent jurisdiction could have considerable consequences. These arrangements which the courts have been asked to sanction generally involve a readjustment of beneficial interests. Yet it may well be that the settlor would in some cases have preferred that, rather than alter the original dispositions, the full duty should be borne. If admitted, the jurisdiction could not be limited to cases where a saving of duty might result, and would cover other cases where the beneficiaries preferred arrangements other than those chosen by the settlor, and there seems no good reason why they should be permitted to override his wishes. There are adequate means to meet emergencies under the other three heads of jurisdiction and traditionally gift horses must be taken with all faults.

Looked at in this light *Chapman* v. *Chapman* does not appear unduly restrictive, but it is unlikely to be the end of the story. It admits a jurisdiction to sanction a compromise where there is uncertainty as to beneficial rights. So a fortunate ambiguity in the settlement may permit the court to sanction schemes such as those rejected in *Chapman* v. *Chapman*. There is already an instance of this in *Re Harvey* (*The Times*, July 2, 1954). There may then be profit in the skill which can find uncertainty in apparently clear words or can draft with just that touch of ambiguity which will permit a compromise, but not avoid the settlement. *Chapman* v. *Chapman* may prove to be a fresh starting point for a different line of cases.

Apart from its particular interest the case is one which abounds with general observations in the nature of equity and indeed of the common law. Such statements as : " Nor, speaking generally, does English jurisprudence start from a broad principle and decide cases in accordance with its logical implication. It starts with a clean slate, scored over, in the course of time, with *ad hoc* decisions. General rules are arrived at inductively, from the collation and comparison of these decisions : they do not pre-exist them," are not, however, fit subjects for notes, though in due course students of jurisprudence will no doubt make them so.

J. D. B. MITCHELL.

ILLUSORY CONSENT

IF laymen have occasionally to be pardoned for not realising that they have made what the law regards as a contract, it must always be puzzling to the business man to learn that the contract that he thought he had made is, in the eyes of the law, no contract at all. It is for this reason difficult not to feel some sympathy with the plaintiffs in *Cie. de Commerce et Commission S.A.R.L.* v. *Parkinson Stove Co.* [1953] 2 Lloyd's Rep. 487, whose initial success before Pilcher J. was reversed by a majority decision of the Court of Appeal.

After introductory exchanges, P. (English purchasers) sent to C. (foreign sellers) an order for a quantity of steel sheets made out on a printed form containing the following provision :

> " This order constitutes an offer on the part of (the purchasers) upon the terms and conditions and at the prices stated herein and to constitute a binding contract upon (the purchasers), said offer must be accepted by execution of the acknowledgment in the form attached by (the sellers), it being expressly understood that no other form of acceptance, verbal or written, will be valid or binding upon (the purchasers). . . ."

C. omitted to sign and return the " official " acknowledgement slip attached to the form, but immediately upon receipt of the order replied to P. in the following terms :

> " Dear Sirs,
>
> We acknowledge receipt of . . . your Order No. K.4851 dated March 5, which we received today and for which we thank you. . . ."

The letter then proceeded to deal with certain arrangements to be made for inspection of the goods and concluded with an assurance that " full satisfaction " would be given.

The subsequent correspondence left small room for doubt that each of the parties regarded themselves as bound. Thereafter, however, P. found themselves obliged to cancel the order. In answer to C.'s claim in damages for breach of contract, it was

urged on behalf of P. that there was no concluded contract (a) by reason of C.'s failure to return the acknowledgment slip or alternatively, (b) assuming that strict compliance with the request for return of the slip was not necessary to create a contract, because C.'s letter of acknowledgment could not be construed as a sufficient acceptance of P.'s offer.

Neither argument found favour at first instance but the Court of Appeal (Birkett L.J. dissenting) held that there was no concluded contract and, accordingly, that C. were not entitled to hold the judgment given in their favour below. Singleton L.J. was clearly of the view that the first of the above contentions would not avail if C.'s letter acknowledging the order could be construed as an acceptance of P.'s offer and Hodson L.J. was only prepared to treat the omission to return the slip as part of the background against which later events had to be considered. The *ratio* of the majority decision, it therefore seems clear, was that C.'s letter of acknowledgment (referred to by Singleton L.J. as the "vital letter" in the correspondence) did not amount to an acceptance of the order.

It is submitted that the plaintiffs may in the circumstances be forgiven if they are left with a feeling that the requirements of the English law of contract are none too easy to fulfil. It is difficult to envisage how they could have more clearly indicated their acceptance of the order, short of returning the acknowledgment slip itself. Yet this, it appears, they were not bound to do.

B. S. E.

REVIEWS

THE LEGAL ASPECT OF MONEY. By F. A. MANN. 2nd ed. [Oxford: Geoffrey Cumberlege. 1954. xxxvi + 488 pp., including indexes. 50s. net.]

A NEW edition of Mann on *Money* is an important event. Since Dr. Mann first completed this excellent work in July 1938 many developments have been witnessed in the law relating to money, and indeed the author has felt it desirable to add no fewer than eight new chapters to his book, some of which include matter that has appeared in the form of articles in learned journals, including the present *Review*.

In matters of such importance as the public international law of money, including the study of the public debts of nations, treaties of peace, the legal basis of occupation paper money, reparations and spoliation, lawyers and economists will have to work together increasingly in the future. Nowadays important deliberate devaluations are often made on so-called "economic grounds" with too little regard for their repercussions on lawful treaties and business transactions. Pegging currency to gold, or devaluing it in terms of gold or foreign currency, are things that are too often done, even by panic legislation, despite their widespread repercussions on contracts of all kinds. In this connection, Mann (p. 421) cites representations of the British Government in 1930, when £50 million of "Rentes" subscribed by British investors during the first world war became, as a result of French devaluation, worth only £13½ million in 1930. This devaluation Dr. Mann regards as a legitimate act by the French Sovereign to ensure economic stability. But where does economic defence end and the deliberate taking of a profit (by changing the rate of exchange) begin? We feel there is much to be said for the view of Borchard, cited but dismissed by Mann (p. 422, note 2) that deliberate devaluation of a spoliatory character by a debtor government may be a ground for international responsibility. Devaluation may be made discriminatory by the manipulation of multiple exchange rates to injure selected victims, or by the forced purchase of property at an under-value solely in order to injure selected persons or races. Discriminatory action may engage State responsibility, and the fact that it is carried out by indirect methods does not, we suggest, alter the position (see Mann in 21 B.Y.I.L. at p. 21). The real difficulty, as Dr. Mann suggests (p. 425), is perhaps the matter of proof: but some discriminations, like the Nazi ones, may appear to be such on the face of the legislation used to effect them. On the other hand genuine exchange restrictions of a necessary and defensive character may well be required by way of restoration or defence to protect a country's trade or currency against speculators and against foreign economic discrimination; such restrictions were envisaged in the U.S.—Greek Treaty of 1951 (Mann, p. 430). Dr. Mann considers that the "development of an effective public international law of money" arises from the Bretton Woods Articles of Agreement of the International Monetary Fund in 1944 (p. 428). But just how effective is this new system? Article VIII (2) (*b*) thereof on exchange restrictions does not seem very effective in England (p. 345).

When the I.M.F. fixed the par-value of the currencies of its members in terms of gold or U.S. dollars, it imposed a duty of collaboration with the Fund to avoid "competitive exchange alterations"—"collaboration" requires either consultation or notice before agreed rates are changed. But is this a serious safeguard against a sudden change? In the case of the sharply criticised British devaluation of 1949 only one day's notice was given by our Government (p. 434, note 2).

The British Exchange Control Act, 1947, with its draconic provisions, was intended to enable H.M. Government to limit dealings in foreign exchange in compliance with the aspirations of the I.M.F. (p. 30), but it seems clear that, as a last resort, a State is still Sovereign over its own money, and that, as with the General Agreement on Tariffs, "escape clauses" are provided for member States. One wonders if too much was not left to the economists, and too little to the lawyers, in the negotiations at Bretton Woods? A reading of Roy Harrod's *Life of Lord Keynes* makes one rather suspect this. Mann points out, for instance (p. 433, note 2), that some British Exchange Controls were contrary to the terms of the Treaty of 1899 between U.K. and U.S.A.: possibly the Bretton Woods Agreement could now be pleaded as a justification, but it seems unfortunate that a comprehensive review of Treaty obligations was not attempted at the time of Bretton Woods. The I.M.F. has disappointed its creators, hence the less ambitious plans of today, like the European Payments Union.

The fact that even paper money, backed or unbacked by metal, represents "purchasing power" (p. 26) makes such English decisions as *Banco de Portugal* v. *Waterlow & Sons, Ltd.* [1932] A.C. 452 (p. 25) and *Emperor of Austria* v. *Day* (1861) 3 De G. F. & J. 217 (p. 436) clearly sound; and Vattel's suggestion that every State should punish the counterfeiting of foreign money in peace-time, supplemented by the Convention of 1929 on this matter, is also clearly common sense. Dr. Mann suggests that counterfeiting enemy currency to destroy his monetary system and credit "cannot . . . be stigmatised as contrary to international law" (p. 437); we cannot agree. The rights even of an enemy occupant are strictly limited by the rules embodied in The Hague and other Conventions for the conduct of warfare on land and by the requirements of good faith: the occupant is not sovereign and, though he may tax, requisition against receipt, impose contributions and so forth, he must account for what he has done when the time for a peace treaty comes. Can he do this if he has counterfeited enemy currency? Dr. Mann rightly points out, when the British and U.S. Governments imposed Allied Military lire they did not counterfeit, they "caused the equivalent of the lire issued in Italy to be credited, in sterling and dollars respectively, to special accounts to provide for the contingency of the lire in future becoming a charge against the occupying powers" (p. 439). Moreover, as Dr. Mann points out, German policy, despoiling private central banks of issue in occupied territory, was illegal. To issue counterfeit notes, *i.e.*, forgeries which pretend to be genuine notes, as the Nazis are said to have done by paying a spy in Turkey in forged £5 notes, is, in our view, a form of deceit, not amounting to a "ruse de guerre," whereby the enemy is allowed to deceive himself about an enemy action; but an infraction of the rules of warfare that limit even the rights of an enemy occupant and, *a fortiori*, of an enemy not in occupation. The imposition of the duty to redeem occupation lire by the Treaty of Peace with Italy (p. 441) could be justified on the basis of reparations, so long as the amount kept did not exceed reparations due: the consequences of the issue were known and generally accepted, but the consequences of putting forgeries into circulation are unpredictable and may well cause loss to innocent friendly neutrals as well as to enemy holders, and in an arbitrary fashion.

Dr. Mann's Chapter XVII, on Inter-State obligations, is most stimulating, and we accept his arguments that the decision of the Permanent Court of International Justice in the *Chorzow Factory Case* (Ser. A No. 13) must not be taken to exclude the possibility of a creditor requiring interest for delay in payment as well as being protected from any unjust depreciation in the value of the money paid to him by way of an indemnity, whether that indemnity arises as a result of a claim in respect of an expropriation or otherwise (pp. 456–7).

The general part of Dr. Mann's work does not call for much comment, dealing as it does with the nature and organisation of money, and with the

principle of "nominalism" on which the author sets much store. If money is a creation of a State and not "a usage of commercial life" (p. 19) it is difficult, however, to see why currency forced upon inhabitants by rebels not recognised as a State, should be considered to be money. The American cases regarding the acts of unrecognised rebels can often be explained, not on the ground that the insurgents have power to issue money and to set up courts, so much as by the anxiety of the courts to see that debtors, compelled to their detriment and the creditors' profit to pay debts during a rebel occupation, shall not be obliged to pay again when the revolution has been suppressed. It is difficult to see how a State can be said to have sole power over its currency if the tokens issued by unrecognised insurgents are permitted to rank fully as currency. If the principle of nominalism means that "a monetary obligation involves the payment of so many chattels, *being legal tender* at the time of payment" (p. 69), it seems difficult to admit of the existence of two rival currencies in the part of a State occupied by unrecognised insurgents.

Aristotle, quoted at p. 71, says, the nature of money is derived from "law," but can "law" here be equated to national legislation (p. 71, note 2)? We think not, because the abusive and discriminatory debasement of money may give rise to State responsibility, and when it does, a State is clearly not irresponsibly entitled to change its monetary legislation at will.

Again, can it said that a very great alteration in prices arising from a sudden depreciation of money by national legislation may amount to the frustration of a contract by legislation (p. 82, note 5)? The English courts (p. 88), unlike the German courts, have so far fortunately not (p. 83) been forced to contemplate the possible results of a catastrophic drop in the value of the national currency, and have shown themselves unwilling either to envisage the problem of frustration in relation to currency, or to adopt any system of revalorising sterling debts, though they have allowed German rules of revalorisation to operate in respect of a German legacy (Mann, p. 85, note 1). Ecclesiastical lawyers were at one time more prudent; the institution of tithes showed that they realised the fact that the nominalist principle of money could lead to the discharge of debts by currency of little real value.

The author's discussion of the Gold Clause is most valuable. We agree the gold value clauses are still possible in England today (p. 126) as means of avoiding devaluation, and we note with interest that the most modern and comprehensive abrogation of protective clauses has taken place in the occupied Germany of the west (p. 129), as a result of Allied legislation.

Dr. Mann adopts the prevailing opinion of some textbook writers that a contract, lawful by its proper law, may be valid even when it is unlawful by the *lex loci solutionis* (p. 177), but he agrees that the English courts will not enforce an obligation involving doing something unlawful in the place of performance. Supervening legislation making payment illegal at a place of performance will be effective in that place only (p. 181).

It is usually fairly easy to determine the money of account in contractual and quasi-contractual cases—the proper law, or failing that, the money of the place of payment (p. 206). But, as Dr. Mann says, it is not so easy to do this in cases where a loss takes place through failure to deliver goods abroad to a purchaser resident in England. The rule expressed in the *Wimbledon* (P.C.I.J. Ser. A No. 1) that the money normally used by the plaintiff should be the measure of his loss is as Dr. Mann suggests (pp. 209 & 449) a useful rule; but is it one which will help much where what the plaintiff wants is the price of an "achat de remplacement" abroad, and when the foreign currency is one with multiple exchange rates. In such a case perhaps all that an English court can do is to find out what sum in sterling, would, at the appropriate rate of exchange, have purchased the goods at the time and place due, adding such extra sum as might be necessary to compensate the plaintiff for his loss.

It cannot be denied that the principle of nominalism in relation to money payments has been widely accepted by English courts (despite the case of *Da Costa* v. *Cole* (1688) Skin. 272, Mann, p. 234, which refused to accept the debased value of Portuguese currency) and we agree that some device like a gold clause is a desirable means of avoiding this sort of loss. But we agree too with Nussbaum that a discriminatory devaluation may be regarded as purely territorial in its operation by foreign courts, since such foreign courts may consider that a sudden devaluation is arbitrary and confiscatory in character. There seems to us to be nothing unlawful in accepting foreign monetary legislation designed to revalorise currency, whilst refusing to accept arbitrary devaluation as capable of having any effect abroad, and Dr. Mann's powerful plea and wide citation of authority does not move us. For even if we accept his view that "the *lex monetae* is that law which from time to time is *de facto* enforced by the supreme authority in control of the currency" (p. 237 and refer to p. 270) that has nothing to do with the rules applied in another legal system with regard to the measure of damages for a wrong cognisable in its courts, as Dr. Mann himself says:

> "Legal tender legislation defines money and the nominal value of money, but it is outside its range to decide whether and under what circumstances redress against its effects may be obtained" (p. 238).

The acceptance of revalorisation laws is certainly proper in relation to contracts governed by the law of the country imposing them in respect of sums of money expressed in the currency of that country: *Kornetzki* v. *Oppenheimer* [1937] 4 All E.R. 133; indeed we see no cogent principle why it should not be applied by English courts to English contracts expressed in terms of foreign currency. The decision in *Re Chesterman's Trusts* [1923] 2 Ch. 466 did not deal with the question of revalorisation. It would be odd if Englishmen, contracting in foreign currency, were held to be worse off than the foreign subjects who could appeal to their revalorisation law governing that currency.

We agree with Dr. Mann (p. 300), that the tender of foreign currency due under a contract will generally be a defence to any subsequent claim thereunder: also that a tender of foreign money of the foreign *loci solutionis* in the local money, even after default, might discharge the debt by the *lex loci*, but we fail to see how such a discharge would be an adequate answer to a separate claim for damages for breach of contract, *e.g.*, resulting from delay, and we think that English courts rightly apply their own rules for the measure of damages for breach in action coming before them.

It is understandable that in systems of law like the German, where specific performance (or execution "en nature") is the normal remedy in connection with the sale of goods, that a writ or judgment may be for a sum in foreign currency (p. 307). And it may well be possible to imagine a claim for specific performance of the delivery of a specifically ascertained collection of foreign coins to be accepted in an English court, but that is in the discretion of the court. Dr. Mann is somewhat sweeping (at p. 325) in his condemnation of the English rules requiring judgment in sterling. The normal English remedy is for damages, and therefore the problem of converting foreign sums of money into sterling is a very important one in England. The rate of exchange for English pounds at the date of the breach is, as we have seen, the English rule, as Mann says (p. 318), and, if the court uses its power to award interest this is not necessarily a harsh rule.

However, once a debt has become a judgment debt abroad, then the date for conversion into sterling will be the date of the judgment (p. 318–9). A foreign judgment does not merge a foreign debt so it will presumably be open to the plaintiff to elect to sue here on the debt, or on the judgment, except where the Carriage by Air Act, 1932, or the Foreign Judgments (Reciprocal Enforcement) Act, 1933, applies: this option may occasionally

enable the plaintiff to mitigate any hardship that might be caused by the rule that conversion is at the date of breach.

A possible answer to Dr. Mann's just criticism that the English rule does not provide for loss occasioned by a depreciation of sterling (p. 322) may be that if a foreign plaintiff sues in a foreign court where he will obtain judgment in some currency other than sterling, he may be able to claim for his loss. Certainly, it is difficult to see how, nowadays, with exchange restrictions, an English court would ever insist on discharging a debt in foreign currency, and we are not convinced by Dr. Mann's ingenious arguments that the Rules of the Supreme Court should be altered (p. 327) to provide for judgments in a foreign money of account to be converted into sterling at the rate of exchange at the date of payment—in practice at the date of execution. The object of the execution of a judgment in England is surely to obtain a specific sum in sterling, and it seems to us that the sum to be obtained should not depend upon the plaintiff's choice of date for execution, which might give rise to speculation, but should be fixed once and for all by the judgment in local currency of the forum. Too often a willing defendant cannot get the foreign exchange to pay with, and where this inability is due to British exchange restrictions he should not be penalised for wanting to discharge his obligations in the only payment available to him. It seems a little academic to speak of the ideal solution of the plaintiff obtaining the foreign currency he bargained for (p. 330) when it is just not possible to provide it. However, failure to use due diligence in obtaining a licence in connection with Exchange Control is a breach of contract: *Brauer & Co.* v. *James Clark* [1952] 2 All E.R. 497.

The chapters on Exchange Controls maintain the high standard of the rest of this book and will be eagerly consulted by practitioners. The analysis of the Exchange Control Act, 1947, is particularly stimulating and well-informed. We cannot but agree with the strictures on the majority decision in *Boissvain* v. *Weil* [1950] A.C. 327 (p. 345) and we hope it will never need to be followed.

We confess we like the Swiss decisions (mentioned at p. 356) which regard payment into a foreign blocked account as no discharge of a debt due in Switzerland, and we are not convinced by German and Austrian cases Dr. Mann cites to the contrary (p. 357). We prefer the Swiss and the old established English cases that refuse effect to foreign penal or revenue laws (p. 359): modern exchange restrictions are nearly always sanctioned by penalties. Indeed we are somewhat surprised at Dr. Mann's acceptance of the whole of the proper law, including its currency restrictions (p. 360), in view of his very sound criticisms of what he terms the "disastrous" case of *Kahler* v. *Midland Bank* [1950] A.C. 24.

We sincerely congratulate Dr. Mann on his achievement and the Oxford Press on their presentation of it. No law library, and no practitioner, lawyer or accountant who deals with foreign business matters can afford to be without this work.

B. A. WORTLEY.

THE QUEEN'S PEACE. By SIR CARLETON KEMP ALLEN, Q.C., F.B.A., Fellow of University College, Oxford: Being the fifth series of Hamlyn Lectures, delivered in the University College of Wales, Aberystwyth, 1953. [London: Stevens & Sons. 1953. 12s. 6d.]

SIR Carleton Allen has given us in this fifth series of Hamlyn Lectures an entertaining picture of the growth of our criminal jurisdiction and of the officers of the peace. The lectures treat of a great deal of matter usually only discoverable in more weighty volumes, and they should deservedly enjoy

a wide public. This reviewer may therefore be forgiven if he now questions their broadest aim and their general approach.

The Hamlyn Trust Scheme is framed "to the intent that the Common People of the United Kingdom may realise the privileges which in law and custom they enjoy in comparison with other European peoples." This seems a somewhat offensive assumption of superiority, and indeed a somewhat unnecessary task to set. The job of polishing the halo of the common law has surely been done to death. Furthermore it seems singularly inappropriate to our criminal law. A system which contains the reactionary barbarisms of the M'Naghten Rules, the Augean stables of the law of theft, and the doctrine of constructive murder should hardly evoke a comfortable awareness of our privileges but rather a burning sense of shame.

Certain particular implications of the lectures may be challenged. Sir Carleton Allen refers on p. 50 to the legislation under George IV and Victoria concerning malicious damage and riots. He comments that "our history contains only too many examples of the necessity for these restraints such as . . . the mob rule of John Wilkes, Peterloo, the Luddites and machine breakers, the Corn Laws and Reform Bill agitations, the Bristol Riots of 1831, the Chartists, the Trafalgar Square Riots in 1886, and many others." It should be pointed out that a considerable body of opinion would regard this legislation not as "necessary restraints" but rather as a savage attempt by a ruthless legislature to uphold an eminently unjust economic system against heroic opposition. This is, of course, only one view of history: the objection is not to Sir Carleton Allen's statement of his view, but rather to his failure to state his view, to his offer of political opinion as legal fact in a book intended primarily for laymen.

Sir Carleton Allen acknowledges the criticisms which are levelled against the administration of criminal justice by lay magistrates, but he seems unduly complacent about the respect in which such officers are held. Indeed, the aura of respect which on p. 179 he tells us that he finds in the ordinary citizen's attitude towards these magistrates in their courts may be his misinterpretation of the quite natural fear of the police who infest these places. Certainly some lay magistrates' courts do excellent and efficient work, but to this reviewer nothing is more frightening in our legal system than the consistent failure to obtain justice and the monotonous ignorance of the law of evidence displayed in some magistrates' courts. There are many towns in this country where the law is in utter disrepute through the judicial activities of lay magistrates.

Sir Carleton Allen's book is a most useful and illuminating sketch of a portion of our legal history. It may be read with pleasure and profit by the lawyer and the layman, as long as the reader remains carefully aware of its unstated assumptions.

G. J. Hughes.

French Administrative Law and the Common-Law World. By Bernard Schwartz. [New York: University Press. 1954. xvii and 345. $7.50.]

Professor Schwartz has previously published books on English and American Administrative Law. To these he has now added one on the *Droit Administratif* of France. Those familiar with his earlier works will know what to expect of this one. They will find a thorough examination of the relevant literature and a carefully documented description of the law. The style is clear, and once more we are indebted to the author for making available within the covers of one book an extensive survey of an important branch of public law.

He first gives an account of the structure and personnel of the French courts and the administration. This is very well done. The next portion of

the book (approximately one half) deals with judicial review of administrative action, and sets out to compare the French rules with those in Anglo-American law. Then the liability of the State and public officers is treated in the same manner; this chapter is too brief to be of great value and omits administrative contracts altogether. In a final chapter the author makes some general comments on the French system. Although he rejects the notion of separate administrative courts he summarises those aspects of the French system that appear to be in advance of our law on the subject. These suggestions merit careful study. Finally there is a most useful bibliography.

Professor Schwartz purports to compare French administrative law with Anglo-American administrative law. It might seem that to compare three different systems of law over such a wide territory is a very stiff task, but in fact the author does not do this. He seems in effect to assume that because England and the United States are common-law countries, and because both respect the Rule of Law (the Dicey version) English and American administrative law can be regarded as the same. As his discussion of judicial review proceeds the less relevant for English law do his comparisons become. From the "Anglo" standpoint is it true to say that "One grounded in the Anglo-American emphasis upon the sharp distinction between administrative and judicial functions cannot but feel that an 'administrative court' is a singular kind of hybrid" (p. 10); that civil servants have the same rights and obligations (these being derived only from contract) as other employees (p. 85); that "the cost of litigation has meant the practical preclusion of judicial review of administration for those lacking financial resources" (p. 125); that "ripeness for review" is a "basic requirement in administrative law" (p. 121)? Is it wise (without referring to errors of law on the face of the record) to rely on the judgment of Denning L.J. in *R.* v. *Northumberland Appeal Tribunal* for the view that certiorari will lie whenever an inferior tribunal decides a point of law wrongly whilst keeping within its jurisdiction (pp. 202–203)?

The author might also with advantage have quoted less from other secondary sources. A French writer is cited as authority for the proposition that "in the English system . . . the judge is named at the outset to the post that he will hold for his entire career" (p. 57) and an American jurist for the proposition that "Two systems of courts seem so natural to the average Englishman that he cannot conceive of any other condition" (p. 51). This preoccupation with the written word of others perhaps accounts for the failure to deal with any of the difficult points of comparison with French administrative law on which the textbooks are silent: for example, the effect of sub-delegation, estoppel, production of government documents, principles of statutory interpretation, the French handling of the *Liversidge* v. *Anderson* and subjective discretion type of case, and the French theory of precedent in administrative law. It also gives the work a slightly unreal out-of-date flavour (just as one doubts whether Lord Hewart ought to be the most quoted authority on English administrative law in 1954). For instance, although the author was certainly unlucky in that the great change in the organisation of French administrative law (whereby the *conseils de préfecture* are now the administrative courts at first instance and the judicial functions of the *Conseil D'Etat* are now only appellate) came into force shortly before the book was published, the change had been announced so early (and is referred to in the text) that he could have devoted more space to the work of these courts.

The solid merit of this book lies in presenting for the first time in English a wide-ranging account of the *droit administratif,* based on a painstaking examination of the French literature. Since very few libraries in this country have a large collection of the standard works of French administrative law, the book does serve a most useful purpose.

H. Street.

The Machinery of Justice in England. By R. M. Jackson, ll.d. 2nd edition by the author. [Cambridge: at the University Press. 1953. pp. ix & 372 (with index). 30s. net.]

English Courts of Law. By H. G. Hanbury, d.c.l. 2nd edition by the author. [Oxford: University Press. 1953. pp. 192 (with index). 6s. net.]

De Quelques Piliers des Institutions Britanniques. By M. Jean Duhamel and M. J. Dill Smith. [Paris: La Vie Judiciaire. 1953. pp. 333 (with index).]

Dr. Jackson's book was reviewed in 4 M.L.R. at p. 45 when we congratulated the author on an admirable piece of work. Since that time the picture of the English legal system which was so clearly painted has altered substantially in a number of respects—particularly, of course, in relation to the administration of the criminal law and to administrative law. These changes are reflected in an expansion of Dr. Jackson's book. He deals effectively with the two major statutes, the Criminal Justice Act, 1948, and the Justices of the Peace Act, 1949, in connection with which he also considers the supplementary Magistrates' Courts Act, 1953. Some of the changes in the law effected by these Acts are of special importance in relation to trying and sentencing children, and the new material devoted to this subject is particularly useful.

Administrative law is discussed under the title Special Tribunals. To deal with the new post-war tribunals which handle such matters as compensation for industrial accidents, the rents of furnished houses, industrial disputes, pensions, and many other matters, to consider some of the more important cases which have come before the courts in the meanwhile, and to bring up to date the description of the whole complex set-up with the use of only ten additional pages involves masterly compression if lucidity is not to be sacrificed, but Dr. Jackson has succeeded admirably.

As he explains in his preface, Dr. Jackson has changed his views on a number of matters, mostly in a conservative direction. He no longer advocates the setting up of a Ministry of Justice, and has abandoned his support of the proposal that the sentencing of convicted prisoners should be taken away from the judiciary and entrusted to special sentencing tribunals. He is now satisfied that progress will follow faster and better by developing existing institutions than by creating new ones. In regard to administrative law he still favours the creation of a system of appealing from the decisions of special tribunals on questions of law, but no longer wishes to see an Administrative Appeals Tribunal established.

In reading this second edition one is again struck by Dr. Jackson's realistic approach to his subject. When studying the jury system, for example, he does not accept the view of the jury as "the foundation of our free constitution" propaganded by great Whig lawyers like Lord Camden, but he analyses the State trials, and finds that most juries, especially under the methods of selection then available, could be relied upon to return verdicts of guilty in sedition cases. This type of debunking enables Dr. Jackson to give free rein to his sardonic humour which often enlivens these pages.

One is also struck by the value of practical experience obtained by Dr. Jackson during his war-time service in Whitehall. This enables him to conduct a balanced and informed discussion of many of the problems handled in this book. They are in fact in large measure problems of administration, which his distinguished work in the Home Office both during and after the war enabled Dr. Jackson to appreciate more intimately. In particular his service as secretary to the Roche Committee on Magistrates' Clerks, and to the Royal Commission on Justices of the Peace enables him to discuss with real authority

some of the more important practical aspects of administering justice in England.

We also reviewed Professor Hanbury's book, which forms an item in the Home University Library, in 8 M.L.R. at p. 83 and at some length. The contrast between the approach of the two authors is marked. In the preface to his first edition Dr. Jackson said "the best introduction to law is a study of the institutions and environment in which lawyers work. It is prescribed, under the title of the 'English Legal System,' for first year study in some law schools, although academic tradition has there succeeded in imposing a mass of historical study to satisfy the idea that it is cultural to know what happened in the Middle Ages and not cultural to know what happens in the twentieth century." It was as a convinced adherent of the tradition criticised in this passage that Professor Hanbury wrote his book, in which about seven pages out of eight are concerned with a historical approach to the description of existing courts of which when he gets to it the learned author finds that "present space permits no details." It was because of this over-emphasis on history that I criticised in detail the first edition in the review referred to above. However, the law schools mentioned by Dr. Jackson are evidently flourishing, for *English Courts of Law* has been reprinted no less than three times since it first appeared, and Professor Hanbury no doubt appreciated accurately the requirements of his readers.

In his "Note to Second Edition" Professor Hanbury states that this has been necessitated by recent and momentous legislative changes, chief among which are those introduced by the Criminal Justice Act, 1948. I have looked in vain for any attempt at an appreciation of this "momentous" legislation —the 1948 Act, according to the references given in the index, seems to have been concerned (i) with being "momentous"; (ii) with placing peers on the same footing as commoners; and (iii) with cutting down the original criminal jurisdiction of the House of Lords—is not this pretty much the same as point (ii)? But this is no doubt the way that a historical mind works.

The Pillars of British Institutions which M. M. Duhamel and Dill Smith have chosen for description to their fellow countrymen are Criminal Prosecution and Habeas Corpus, Contempt of Court, the Régime of the Press, Testimonial Proof, and the Police. In order to make the picture more intelligible they provide also chapters on the Organisation of the English Judicial System, and the Legal Profession: indeed the three essential pillars are Habeas Corpus, Contempt of Court, and the Press, which were originally the subject-matter of lectures at the Ministry of Justice.

Mr. Duhamel is a member of the English bar and a well-known French authority on English institutions. His name is a sufficient guarantee of the soundness of this work, and indeed of its literary excellence. With the exception of our rules of evidence, which they criticise severely, the authors tend to look at our legal institutions through rose-coloured glasses. This is pleasant to an English reader, though the main interest is the fact that the glasses are also foreign, which means that there is a running commentary on a comparative basis.

It is interesting to notice that they make use of Professor Hanbury's book on English courts of law for their historical material, but they never get bogged down in the past, describing the history of the institutions simply for the purpose of making them more intelligible. At the end of the principal chapters there are a number of short, rather too short, summaries of leading cases relating to the matters discussed. Most of the judges mentioned are given short biographical notices in footnotes, sometimes with appreciation of their importance to English jurisprudence, though with the latter I often did not find myself in agreement. There are a few mistakes in chronology, but generally speaking the book is accurate, and stimulating, and should prove of considerable interest to English readers.

C.

McNair's The Law of the Air. 2nd Edition. By Michael R. E. Kerr, M.A., Barrister-at-Law and Robert E. MacCrindle, LL.B., Barrister-at-Law. [London: Stevens & Sons, Ltd. 1953. pp. xxiii and 500. £3 3s.]

When Sir Arnold McNair in 1932 published his Tagore Lectures the book was the first large-scale treatment of the law relating to aviation and the use of the air. Since that date the phenomenal growth of aerial transport has been accompanied by a formidable legislative development, both national and international. In that respect this country has not been unduly backward: Statutes and Orders we have in plenty. In other ways, however, English law has moved forward only with its customary timidity. Case law has been disappointingly sparse and legal literature, with the conspicuous exception of the exhaustive treatise by Shawcross and Beaumont, has been meagre. Nor has air law yet found its place in the regular curriculum of any English law degree, though London University is about to blaze a trail here.

A new edition of Sir Arnold McNair's pioneering work is therefore singularly timely. Almost completely rewritten and over twice as long as the first edition, it is to all intents and purposes a new book, but one which still bears the original stamp of the author's mind and which, happily, has benefited by his perusal of the rewritten text.

Since the English law is conditioned by international conventions and since municipal case law is still relatively undeveloped, the book necessarily makes reference to international law and conventions and to the decisions of courts in other countries. But, as the introductory chapter emphasises, the aim of the volume is to state the aeronautical law of *England*, and purely international law is dealt with briefly in the first few pages. Thereafter the English law, both municipal and its rules of private international law, are explained in 280 pages of scholarly and eminently readable text. The rest of the book contains appendices of Conventions, Statutes, Orders and General Conditions of Carriage and of a short but erudite discussion of the origins and history of the maxim, *cujus est solum ejus est usque ad coelum*. The result is a work which will be indispensable to the practitioner as a supplement to the more exhaustive Shawcross and Beaumont and to the student for whom the other book, essentially a work of reference, is unsuited as a textbook. The student will also appreciate the inclusion of a bibliography and, all in all, there can be little doubt that this new edition is just what was needed to give a fillip to academic study of a subject, the future importance of which it would be difficult to exaggerate.

The learned editors have done their work admirably and are to be particularly congratulated upon their success in maintaining brevity without sacrificing lucidity. They were unlucky in that various relevant events occurred while the book was in the press. Some of these are referred to in an addendum to the preface but it was not possible to take note of the Air Corporations Act, 1953, section 3 of which belatedly places the Corporations in the same position, as regards limitation of actions, as the other public corporations.[1] This is the legislation which the editors call for at p. 203 after forcefully pointing out that the previous state of the law virtually involved this country in a breach of the Warsaw Convention.

In the light of the growing use of air transport for both goods and passengers, particular importance attaches to Chapters 6–9, dealing with contracts of carriage, maritime analogies (which the author and the editors believe should be applied only with great caution), and insurance and charterparties. In this connection, a question of great practical importance—whether

[1] s. 3 itself has already been repealed by the Law Reform (Limitation of Actions) etc.) Act, 1954. It is not often that the law on a particular point is changed twice in the course of a single parliamentary session! The Corporations now enjoy no privileges as regards limitation of actions.

air consignment notes can be regarded as documents of title to the goods represented thereby—is discussed at pp. 194 *et seq.* With the general conclusion—that as yet such notes cannot be equated to bills of lading—few will quarrel, although many will think that sooner or later this development will be inevitable. But, with respect, the argument of the learned editors seems less satisfactory. They first state that the question is whether such notes are documents of title within the meaning of the Factors Act, 1889, and the Sale of Goods Act, 1893. They then restate this question as follows: "Does the indorsement of an air consignment note pass to the transferee the property in the goods comprised in it, and can an air consignment note, like a bill of lading, be regarded as a negotiable instrument in the popular, though not in the strict, sense of the term?" This restatement may be criticised on the ground that the distinguishing feature of a bill of lading is that indorsement of it passes *possession* (rather than *property*) of the goods, but this is of minor importance compared with the objection that the alleged restatement is in reality a totally different question. To be a document of title *within the meaning of the Factors and Sale of Goods Acts* it is not necessary that the document should possess either of the characteristics specified in the restatement. For the purposes of the Acts, the expression includes "any document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented": F. A., 1889, s. 1 (4). It is therefore submitted that if an air consignment note purported to authorise delivery to "A and his assigns" or to "A or bearer" it would be a document of title for the purposes of the Acts—though not, as yet, one which could be regarded as representing the goods for all purposes. Hence it would be quasi-negotiable in the sense that a holder of it could pass a good title under F. A., 1889, s. 2, if he was a mercantile agent, or under sections 8 and 9 (otherwise S. of G. Act, 1893, s. 25) if he was a buyer or seller, while transfer of the note to a bona fide purchaser would defeat the seller's right of stoppage *in transitu* by virtue of S. of G. Act, 1893, s. 47. Admittedly, the I. A. T. A. consignment note does not in fact authorise delivery to assigns or to bearer and the point may therefore be academic. On the other hand, it seems that the air corporations and companies have it in their power to confer this limited quality of "negotiability" on their notes, whenever they want to. Further, it seems that a passenger's luggage ticket has already acquired this status, for such tickets must, under the Convention and the Act, contain a statement that delivery of the luggage will be made to the bearer of the luggage ticket!

However, these intriguing avenues must not be further explored here—though perhaps the learned editors will venture down them in the next edition, which undoubtedly will be needed considerably before the expiration of another twenty-one years. The learned editors have shown that in its preparation they can be trusted to maintain both the spirit and the quality imparted to the work by Sir Arnold McNair.

L. C. B. G.

The Law of Tort in Local Government. By Mary Bell Cairns, ll.m., ph.d. [London: Shaw & Sons, Ltd. 1954. xxiii and 142 pp. (with tables and index). 21s.]

Books on substantive administrative law are greatly needed, for there are many important differences between the liability of public authorities and that of private individuals for tort, breaches of contract, crimes and other wrongs. But if such studies are to be valuable, they must distinguish those aspects of liability which are peculiar to public authorities; and Dr. Cairns,

who has collected and examined many cases in which local authorities have appeared as defendants, has overlooked this preliminary question. Parts of this book are useful; the passage on defamation is an example. But too often cases are set out under headed sections in which the fact that a local authority was concerned is quite irrelevant. *Bowater* v. *Rowley Regis Corporation* (on *volenti*), *Knott* v. *L. C. C.* (on animals), *Chapelton* v. *Barry U. D. C.* (on negligence), *Owens* v. *Liverpool Corporation* (on shock), *Parkinson* v. *Liverpool Corporation* (on negligent driving) and *Liddle* v. *Yorkshire C. C.* (on trespassing children) are all cases of this kind. Nor is any attempt made to relate these cases to others governing the wider issues. Thus the only other "shock" case mentioned is *Bourhill* v. *Young* and then only to state that *Owens'* case was there criticised "so that the legal position is not free from doubt" (p. 75).

On the substantive law, there are many confused passages. It is not true to say: "Responsibility for a tort can only be imputed to a local authority if two conditions are satisfied. First, it must be proved that the local authority is *vicariously liable* for the tort and, secondly, that tort must be one which it is within the power of the local authority to commit" (p. 5). One obvious example which contradicts the first "condition" in this proposition is the liability of an authority as occupier of dangerous land. The second "condition" is fundamentally misleading; later it is restated to mean that the authority must have the legal capacity to commit the tort (p. 14). The general explanation of the nature of vicarious liability is inadequate. The "control" test is set out and the old hospital cases are cited without mention of the remarks of Denning L.J. in *Cassidy* v. *Ministry of Health*, although this case is mentioned fifty pages later. Again, we are told on page 8 that the servant must be acting within the scope of his employment and in the next sentence that this has two possible meanings, one of which is that the act done by the servant must have been "directly authorised by the local authority." Twenty lines later, however, the author states: "A local authority may also incur liability for the tort of its servants if it directly authorises the tort. This responsibility arises irrespective of the rules relating to the scope of the servant's employment" (p. 9).

In a passage on "The Enforcement of Powers" we are told, "No action may be brought in the courts to make a local authority exercise the discretionary power with which it has been entrusted by the legislature" (p. 116). This is not so, as reference to *R.* v. *L. C. C., ex p. Corrie* (1918), amongst many cases, would have shown. Equally false is the statement: "When a remedy is given by the legislature in the event of default by the local authority to exercise its discretionary power, then that is the only remedy available to a person injured" (p. 117). This is partly contradicted by a half-truth on p. 122: "The intention of the legislature is the deciding factor in determining whether the statutory remedy is to be the sole remedy or whether it may be an alternative remedy to an action for damages or an injunction."

The pages on limitation of actions do not contain any mention of *Firestone Tire and Rubber Co.* v. *Singapore Harbour Board* (1952) and so it is said that "acts performed voluntarily fall outside the meaning" of the Public Authorities Protection Act (p. 128).

There are a number of minor mistakes. A parish meeting is not an elected body (p. 1); the "inhabitants" of a borough are not incorporated (p. 2); resolutions of committees are not necessarily subject to council approval (p. 15); the Ministry is not called "Local Government and Housing" (p. 60); the name of Lynskey J. is misspelt on p. 67. A large number of case references in the footnotes are to "T.L.R." only, although these cases have been fully reported in the Law Reports; the index of cases rectifies this but, rightly or wrongly, the reader is left with the worst of suspicions.

Finally, a word must be said about the style. There are a number of

simple grammatical errors like "inherent to" and "distinct to" (both on p. 3). But there are also sentences of this kind: "With regard to the relation of master and servant, there are many persons employed by local authorities in respect of whom this relation exists but somewhat different considerations apply to those persons engaged in local government service than to those employed by private individuals" (p. 6) and "The Housing Acts are analagous [*sic*] to the Factories Acts in that they make provision for the protection of the housing of the working classes, out of which local authorities cannot contract" (p. 38).

Dr. Cairns has shown a capacity for tackling a difficult problem and much hard work has gone into this compilation. There is scope for her undoubted talents; the need for research in this field is great and it is to be hoped she will persist in it. But she has not yet realised the difficulties or the implications of this sort of study. *Hinc illae lacrimae.*

J. A. G. Griffith.

The Law of Trusts. Sixth Edition. By George W. Keeton, M.A., LL.D., of Gray's Inn, Barrister-at-Law; Professor of English Law in the University of London; Dean of the Faculty of Law, University College, London. [London: Sir Isaac Pitman & Sons, Ltd. 1954. lxviii and 499 pp. £2 5s.]

This work is a thoroughly comprehensive and reliable statement of the rules of law and equity applicable to trusts of real and personal property. Well over two thousand cases and one hundred statutes are discussed and referred to in a most readable and authoritative manner.

The arrangement of earlier editions is maintained, the principal additions being on Charitable Trusts, and the inclusion of a chapter entitled: "Trusts in the Conflict of Laws."

Part I (Chapters I to X) concerns the formation of trusts, and deals with their nature, development, classification and creation. Charitable, implied, resulting and constructive trusts are all given detailed consideration, along with the principles affecting their validity and enforceability.

In Part II (Chapters XI to XVI) the rules governing the appointment, retirement and removal of trustees are first examined, and a lucid analysis follows of the various powers and duties of trustees in relation to the administration of trust properties.

Part III (Chapters XVII and XX) relates to breach of trust, and deals with both the civil and criminal liability of trustees, as well as with the special rights of beneficiaries in regard to compelling performance, impounding, and following trust property. Finally, the various limitations on the liability of trustees are considered and an interesting account is given of the main rules evolved by the English courts where conflict problems have arisen.

Apart from being a valuable exposition of the law of trusts as it exists in the middle of the twentieth century, this work could well be a fertile source for a detailed inquiry into the need, desirability and legality of extending the idea of trust obligations and duties so as to superimpose some, at least, of the responsibilities of trustees upon *all* members of the public who are entrusted with the wise, prudent and diligent administration of other people's property. Just as uses and trusts were originally developed to safeguard the interests of persons other than the strict legal owner, so too, it would seem, that according to basic conceptions relating to the true nature of trusts as, for example, the view that it is "a confidence reposed in some other" (Coke); "a fiduciary relationship with respect to property" (American *Restatement*); "the appropriation of property to the fulfilment of some object" (Lepaulle), or "an equitable obligation" (Underhill), there would

appear to be no reason why, in modern times, appropriate principles of trust law should not be adapted, and applied, whenever the expenditure of public money, or the administration of public property, is involved.

It is interesting to observe in Chapter VIII that many functions of modern public authorities have formerly been recognised as suitable subjects for public trusts; for example, specific gifts for the repair of highways or bridges (*Eltham Parish* v. *Warreyn* (1635) Duke 67; *Forbes* v. *Forbes* (1854) 18 Beav. 552); for the supplying of water to a town (*Jones* v. *Williams* (1767) Amb. 651); for the establishment of a cemetery (*Att.-Gen.* v. *Blizzard* (1855) 21 Beav. 233); for improving, paving or lighting a town (*Att.-Gen.* v. *Heelis* (1824) 2 S. & S. 77); and for the provision of a fire brigade (*Re Wokingham Fire Brigade Trusts* [1951] Ch. 373). Moreover, general gifts to a parish (*West* v. *Knight* (1669) 1 Cas. in Ch. 134; *Att.-Gen.* v. *Webster* (1875) L.R. 20 Eq. 483); or to a city (*Att.-Gen.* v. *Carlisle Corporation* (1828) 2 Sim. 437), or "unto my country England" (*Re Smith* [1932] 1 Ch. 153), have been held to be within the law relating to charitable trusts, and, of course, trusts "for the advancement of education" and "for other purposes beneficial to the community" are within Lord Macnaghten's classification of charitable objects in *Income Tax Commissioners* v. *Pemsel* [1891] A.C. 531.

Cases such as these would seem to suggest that public money compulsorily raised for public purposes is in no way fundamentally different from money specifically given to a public authority for such purposes, and, therefore, although there can be no question of superimposing trusts in their ordinary private sense upon governmental processes as a whole, the establishment of minimum standards and safeguards, akin to the obligations and duties of trustees generally, would appear to be both necessary and desirable, in order properly to protect the thousands of millions of pounds worth of public property in the modern State. Within the next few decades, it will be interesting to see whether or not the inherent excellence and adaptability of the English law of trusts will necessitate the inclusion, in future editions of this work, of important additional chapters on such matters as constitutional, administrative, and governmental quasi-trusts, with special reference to the position, obligations and duties of those entrusted with the expenditure of public money and the administration of public property.

M. R. R. DAVIES.

THE LAW OF WILLS. Fourth Edition. By S. J. BAILEY, M.A., LL.M., of the Inner Temple, Barrister-at-Law, Rouse Ball Professor of English Law in the University of Cambridge. [London: Sir Isaac Pitman & Sons, Ltd. 1953. xlix and 281 and (index) 23 pp. 40s.]

BAILEY on *Wills* now enters upon its fourth edition. Except for a slight increase in girth, largely due to the need for dealing with recent statutes, it bears few marks of age. It remains an excellent and readable textbook on what could well be an arid subject. Its great merit lies in the balance of treatment and the fullness of illustrative examples. As, however, statutory developments force the book to grow in size, it might be considered whether, in future editions, the more general passages not specifically directed at wills might not be shortened. On the one hand, while it cannot be denied that these passages make the book to some extent self-contained, it seems likely that most of its student readers will already have a sufficient general background of land law. On the other hand the space thus saved could be used for the fuller treatment of such matters as the Intestates' Estates Act, 1952 (which clearly arrived when the present edition was well advanced). It seems unlikely, for instance, that the new power of appropriation can be left without

comment. Similarly, some matters specifically concerning wills, such as capacity, might also be more fully dealt with.

The date of the 1952 Act has unfortunately meant that not all of its consequences have been fully carried into the text. Thus at p. 35 the obligation to bring into hotchpot in cases of partial intestacy appears still to be limited to children and issue. On the other hand new cases have been carefully welded in, but the amendment to the rules as to wages as a preferred debt has escaped. These are small matters unlikely to detract from the merits of a book which despite its preparatory claim to be an introductory survey for students achieves very much more while retaining both grace and clarity.

J. D. B. MITCHELL.

THE MEANING OF INCOME IN THE LAW OF INCOME TAX. By F. E. LABRIE, Associate Professor in the School of Law, University of Toronto. [Toronto: University Press (London: Geoffrey Cumberlege). 1953. x and 380 pp. 97s. 6d. net.]

"INCOME TAX, if I may be pardoned for saying so, is a tax on income. It is not meant to be anything else," so said Lord Macnaghten in *Att.-Gen.* v. *L. C. C.* [1901] A.C. 26, 35. What, however, is the meaning of the term "income"? The British Income Tax Acts nowhere define this expression; they merely specify sources of income and lay down rules for computing the income arising therefrom. These Acts tell us, therefore, nothing of the real nature of "income" nor what determines whether a receipt shall be endued with a "revenue" or a "capital" quality. In Canada, too, the Income Tax Act is just as vague for it defines "income" as "income . . . derived from all sources"!

Professor LaBrie in a chapter entitled "Income at Common Law" deduces from the decisions of the courts, both here and in Canada, two cardinal principles which determine the nature of income. The first is that "Income includes only amounts arising or resulting from the pursuit of gain"; this principle, he says, enables one to determine whether a receipt is of a "revenue" or a "capital" nature and accounts for the exclusion of "capital gains" from the meaning of "income." The second principle defines "income" as "net income," that is "'incomings' less certain 'outgoings' or expenditure to be determined according to ordinary commercial principles."

Dr. LaBrie devotes three chapters, on "Income from Business," "Income from Property" and "Income from Personal Services," to an elucidation of his first principle. "Income," he says as regards businesses, "arises from the pursuit of gain and it is this *subjective* element which distinguishes 'income' from other forms of 'incomings,' especially 'capital gains'"; the learned author, however, admits that the test actually adopted by the courts is an *objective* one for they have always avoided questions of "intention." The courts, he says, have looked on business as "the pursuit of gain through undefined activity in an unlimited sphere" and, in the case of persons already engaged in trade, have tended to regard all gains made by the trader as "income" unless they can definitely be shown to be "capital," see for example, *Imperial Tobacco Co., Ltd.* v. *Kelly* [1943] 2 All E.R. 119. It is only in the case of purchase and resale by a non-trader that the strict concepts of "carrying on a trade" are applied, *cf. Jones* v. *Leeming* [1930] A.C. 415.

The issue of "income" or "capital," says Dr. LaBrie, equally dominates incomings arising from the ownership of property. In our law where capital is converted into income, as in the case of an annuity, the whole of the latter, incorrectly says the learned author, is regarded as income; this doctrine was so averse to the economic structure of Canada that the legislature altered the law and only the strict income content of an annuity is taxable there. In Canada income from companies is as a rule taxed twice over, once on the

company and again on the recipient of the dividend; this multiple taxation of corporate income does not occur here because of the operation of the principle of "taxation at the source," see I. T. A., 1952, s. 184. The most interesting part of the chapter dealing with "Income from Personal Services" is that relating to compensation for loss of office; Dr. LaBrie explains the exclusion of such payments from the term "income" on the ground that they are made in exchange for the loss of a source of income and are therefore capital in their nature; the legislature in Canada, because of the consequential loss of revenue, has enacted special provisions taxing payments made on or after retirement from employment.

In Part III of his work, Professor LaBrie considers his third principle under the head "Deductions," *i.e.*, from gross incomings. Here he is somewhat handicapped in his elucidation of a general principle by the Canadian statutory provisions which were somewhat similar to, but much more restrictive than, the British rule prohibiting a deduction for any expenses not "wholly and exclusively laid out . . . for the purposes of the trade," section 137 (*a*) I. T. A., 1952, reproducing Rule 3 (a) of the Rules relating to Cases I and II Schedule D, Income Tax Act, 1918. In a lengthy chapter (VI), Dr. LaBrie considers most of the British cases dealing with "deductions" and arrives at the conclusion that behind the express provisions of our Income Tax Acts lies the doctrine that income from trade is to be computed according to ordinary commercial principles but that overly remote expenditures and any expenditure of a capital nature are excluded. He definitely disapproves of Lord Davey's gloss in *Strong & Co.* v. *Woodifield* [1906] A.C. 448, 453 that expenditure to be allowable must have been made "for the purpose of earning the profits."

Since two-thirds of the 400-odd cases considered in this book are British, the value of the work to the practitioner here is self-evident for he will find in Dr. LaBrie's shrewd comments much of value to a consideration of the principles underlying the stark words of the statute. Your reviewer does not like to end with a word of criticism but both the Table of Cases, which lacks any reference to the various series of Law Reports, and the Index are inadequate for so important a work.

A. F.

HANS WÜRDINGER. Freiheit der persönlichen Entfaltung, Kartell- und Wettbewerbsrecht. Juristische Studiengesellschaft, Karlsruhe. Schriftenreihe, Heft 8. [Verlag C. F. Müller, Karlsruhe. 1953. 19 pp. DM 1.80.]

THIS little pamphlet contains a lecture given by Professor Würdinger to the Juristische Studiengesellschaft at Karlsruhe. Professor Würdinger is one of the leading authorities on commercial law and the author of a work of some merits on English legal history. The Juristische Studiengesellschaft is a body sponsored by the judges of the German Federal Supreme Court and a number of other most responsible persons and organisations. The person of the author and the importance of the body under whose auspices this lecture was given and which is responsible for its publication, render it desirable to draw attention to a feature of this pamphlet which can well be described as being significant of certain trends of development in certain sectors of contemporary German legal science.

Decartelisation was considered to be a task of immediate importance by all the four Occupation Powers of Germany. Its necessity is said in para. 12 of the Potsdam Agreement to follow from the fact that decentralisation of economic power was desirable having regard to the monopolistic power acquired by some of the concentrations effected in Germany, both before and during the Nazi régime. In the British Zone the Potsdam Agreement was put into effect by Military Government Ordinance No. 78. The preamble to this Ordinance reads as follows:

> This Ordinance is enacted in accordance with Paragraph 12 of the Potsdam Agreement in order (i) to prevent Germany from endangering the safety of her neighbours or again constituting a threat to international peace; (ii) to destroy Germany's economic potential to wage war and (iii) to ensure that measures taken for Germany's reconstruction are consistent with peaceful and democratic purposes; (iv) to lay the groundwork for building a healthy and democratic German economy.

Identical enactments exist in the other zones of occupation. The power of legislation on the problem of decartelisation has now passed into German hands. Discussions are going on in interested circles as to the form and contents of a German law to replace Military Government Ordinance No. 78 and the corresponding laws in the other Western Zones of Occupation, all of which bear close and deliberate resemblance to the anti-trust legislation of the U.S.A. No doubt any representative of German legal science is fully entitled to say that he welcomes the fact that Military Government legislation which is modelled on a foreign legal system will soon be replaced by German legislation. Indeed, it would probably be strange if he were to say anything else. It is, however, something entirely different if the opportunity of this discussion is used for the purpose of attacking without the slightest justification the motives and aims of the Allied Military Government in Germany whose record of achievement is an established historical fact. Yet, this is what has been done in this lecture delivered before so distinguished an audience and published under the auspices of so important an organisation.

Herr Würdinger comments on the Military Government Ordinances and on their preamble in the following words:

> These Ordinances breathe—this appears clearly from the preamble—the spirit of slavery and compulsion, not that of liberty. Their purpose was to weaken the German economy and to cut down the permissible size of enterprises to the Western German miniature markets, left over at the end of the war. They ordered a splitting up of economy and commanded unrestricted competition just because of its detrimental effect.

In other words: a plainly diabolical intention is imputed to the occupying powers in that it is said that they imposed decartelisation upon the three Western Zones of Occupation with a view to preventing the economic recovery of Germany. One must wonder how many members of Herr Würdinger's audience can possibly have swallowed this tall statement. Did none of them remind the speaker of the pioneer work done by the Military Government in setting Western Germany on its feet? Did none of them remember Marshall Aid? Has none of them drawn attention to the fact that it is just nonsense to say that the U.S.A. can have intended to keep Germany down by introducing in Germany laws which in the opinion of many experts have greatly contributed to making the U.S.A. as powerful as she is today?

Herr Würdinger adds:

> Meanwhile hatred has given way to quiet objectivity, the wish to enslave to readiness to co-operate, economic suppression to economic assistance, the command of the occupying power to agreement between equal partners.

It is clear that a new legend is in the making. The occupation of Western Germany, it seems, had nothing to do with the necessity of reintroducing some sort of order into a country whose Government had collapsed after overthrowing the entire world with the worst of all wars and committing crimes unheard of in the history of mankind. The sole purpose of the occupation was "hatred," the "wish to enslave" and "economic suppression." It is graciously admitted that the Occupying Powers have somewhat improved since that early period, but no doubt it is thought useful to remind the German public of the régime of oppression set up by Britain, France and the U.S.A. in 1945 in Western Germany. The usefulness of such a legend becomes apparent, if one remembers that recent research has brought to light a number of facts, which

those responsible for the concentration of German economic power during the Weimar Republic and during the Nazi period may well wish to make people forget. It is sufficient to mention in this connection the financial support given to the Nazi Movement in 1932 (see Bullock, *Hitler, A Study in Tyranny*, 1953, p. 243), the findings of the District Court of Frankfurt in the case of Wollheim against I. G. Farben and those of the U.S.A. Military Courts reprinted in the *Annual Digest of International Law Cases*, 1947, No. 122 (Flick), 1948, No. 214 (Krupp) and No. 218 (I. G. Farben). No doubt the process of myth-formation is at present in an early stage. It is this fact which renders it desirable to draw attention to it now and to allot to a review of Herr Würdinger's pamphlet more space in an English legal periodical than the rest of its contents could possibly justify.

E. J. COHN.

SECURITIES FOR BANKERS' ADVANCES. By J. MILNES HOLDEN, LL.B., PH.D., A.I.B., of Lincoln's Inn, Barrister-at-Law. [London: Sir Isaac Pitman & Sons, Ltd. 1954. xxx and 330 and (index) 12 pp. 25s. net.]

THIS new book is divided into six Parts. The first, which represents almost a third of the book and which deals with mortgages of land, compares very well indeed with the chapters on mortgages in students' textbooks on Real Property. Then follow Parts relating to mortgages of life policies and of stocks and shares. Part IV contains by far the best treatment in a student's textbook of the subject of guarantees, and the way in which Dr. Holden goes through the clauses of a typical guarantee agreement, explaining their purpose and how they circumvent legal rules disadvantageous to a bank lending on the security of a guarantee, is really excellent. The next Part contains chapters on mortgages, pledges and hypothecations of goods, the Factors Act, 1889, and agricultural charges. The final Part gives an account of miscellaneous topics, including mortgages of equitable interests, assignments of debts, collateral security, and the special position of a limited company as borrower.

Throughout the book Dr. Holden maintains a consistently high standard. The only error noticed is a small one on p. 254, where *Oppenheimer* v. *Attenborough & Son* [1908] 1 K.B. 221 is ignored, and it is stated that a mercantile agent can pass ownership under section 2 of the Factors Act, 1889, when he is acting in the ordinary course of *his* business. The omission of any reference to sections 88 (1) and 89 (1) of the Law of Property Act, 1925, is surprising; it is not sufficient to state that a mortgagee of land has power to sell without any indication of the estate which the purchaser from him obtains. In a second edition there could usefully be some explanation on p. 44 of the term "estoppel," and some indication on p. 170 that the rule that a guarantee is unenforceable by action unless evidenced by writing is not without exception.

The book contains a lucid and accurate account of the law and of the consequential banking practice, written by an author who is obviously a master of both. Clearly it will prove invaluable not merely to candidates for banking examinations but also to bank officials, who will be confronted in their daily work with very few problems relating to securities which cannot be answered from it. One can confidently predict for it a great success.

J. A. HORNBY.

GILBART LECTURES ON BANKING, 1953. The Law relating to the Collection of Cheques by Bankers for their Customers. By LORD CHORLEY, M.A., Barrister-at-Law. [London: University of London, King's College; Blades, East & Blades, Ltd. pp. 56. 2s.]

FOR the 1953 Gilbart Lectures, Lord Chorley has taken for his subject the collection by bankers of their customers' cheques, and the result is a lucid, learned and accurate examination of this important specialist topic, an examination of great value and assistance to banker and lawyer alike.

The Lectures are divided into five main heads, (i) the meaning of the word "collecting," (ii) the capacity in which the collecting banker acts, (iii) the legal results which flow from his actions, (iv) the protection conferred on him by section 82 of the Bills of Exchange Act, 1882, and (v) the remedies of the collecting banker against his customer or a third party, if the banker cannot avail himself of section 82.

Of these heads, (ii), (iii) and (iv) deservedly receive the fullest treatment. The exposition in (iii) of the tort of conversion for which a collecting banker would be liable at common law, and the discussion in (iv) of the practical steps which he might take in order the more easily to establish that he has acted without negligence, so as to avail himself of section 82, are of especial value to the banker, but are also of great interest to the lawyer as they demonstrate the practical difficulties which confront the banker.

The inquiry in (ii) into the capacity in which the collecting banker acts when collecting cheques for his customers contains a detailed criticism of the well-known banking decision in the *Gordon* case. Lord Chorley's main thesis is that the House of Lords were wrong in assuming that a collecting banker cannot at one and the same time be both a holder for value and an agent for collection. Thus, he argues, where a collecting banker advances money to his customer against uncollected cheques, the banker has a lien on those cheques for the amount of the advance, and therefore, by section 27 (3) of the Bills of Exchange Act, 1882, "he is deemed to be a holder for value to the extent of the sum for which he has a lien." The existence of such a lien does not prevent the general property in the cheques from remaining in the customer, and the banker has merely a special property in them which is quite compatible with his capacity as agent for collection.

As Lord Chorley remarks, however, this solution of the problem presented by the facts in the *Gordon* case did not commend itself to any of the eminent lawyers who took part in the case, and so we are left with the difficulties inherent in that decision, and with the salutary reflection that, if the question of the capacity in which the collecting banker acted had been left to the jury by the trial judge as a question of fact, as Lord Macnaghten in the House of Lords said it should have been, in all probability nothing more would have been heard of the case.

Be that as it may, this re-examination of the case and, indeed, the clear and skilful examination of all the various topics dealt with in these Lectures serve the admirable purpose of stimulating thought and discussion, and emphasise the overwhelming importance of principles in the law, in contrast with the idolatry, especially, as the author points out, among amateur lawyers and students, of the particular precedent with which our English law is becoming overburdened.

C. F. PARKER.

PROBLEMS OF PARLIAMENTARY GOVERNMENT IN COLONIES. A Report prepared by the Hansard Society. [London: The Hansard Society. 1953. x and 154 pp. 12s. net.]

OF the several publications of that wholly admirable institution, the Hansard Society, this is perhaps the most valuable. The Report was drafted by Mr.

Sydney D. Bailey, the Assistant Director of the Society, in conjunction with a strong advisory committee. The Society conducted correspondence with more than a hundred persons in various parts of the world in connection with the Report. The appendices to the Report include a list of non-self-governing territories of all nations, a selection of representative statements on British colonial policy, an examination of the doctrines of paramountcy and partnership, and fuller consideration of the problems of Malaya, Mauritius and the Belgian Congo.

The Report analyses the problems involved in the development of parliamentary institutions in dependent territories. It examines the impact of modern ideologies on colonial peoples, the differences between the colonial policies of the metropolitan countries, the special difficulties inherent in plural societies, the role of local government as a school for parliamentary government, and the possibilities of functional co-operation. It is more concerned with stating problems—and it states them with an exemplary lucidity—than with offering glib solutions. Lines of approach towards future progress are suggested without dogmatism.

Controversy over the constitutional problems of the dependent territories of the Commonwealth is too often bedevilled by muddled thinking: emotional reactions to specific situations are substituted for a cool appraisal of the larger issues at stake. Clearer thinking will be stimulated by this Report. It should be read and reread by all who are interested in public affairs.

S. A. de Smith.

Pakistan Constitution: An Essay. By C. M. Shafqat. Foreword by Mr. Justice Kayani. [Lahore: Published by the author. 1953. 86 pp. Rs. 2/8/.]

A writer in the first number of the *Pakistan Law Review* has drawn attention to the fact that "Pakistan suffers greatly for want of writers on legal subjects." One may add that students from other countries who are interested in the constitutional law of Pakistan are handicapped not only by the absence of commentaries but also by the extraordinary difficulties they experience in trying to obtain an up-to-date text of the temporary Constitution and by the dearth of accessible official publications in general. Mr. Shafqat's essay on Pakistan's temporary Constitution therefore comes as a welcome surprise. The author has read widely in legal theory and the constitutional laws of England, other Commonwealth countries and the United States. It is fair to say that his powers of exposition are not yet commensurate with his insight and erudition. The arrangement of material is sometimes puzzling—the last page might well have been the first—and there are a few obvious mistakes (*e.g.*, in notes 45 and 76). But the essay, read as a whole, promises good things for the future. When the new Constitution of Pakistan is finally adopted it will have at least one able commentator.

S. A. de Smith.

Le Conseil d'Etat: Livre jubilaire. [Paris: Recueil Sirey. 1952. 693 pp.]

This volume has been published to commemorate the 150th anniversary of the Conseil d'Etat. After an introduction by Professor René Cassin, Vice-President of the Conseil, it is divided into two principal Parts entitled "Continuité, évolution et méthodes du Conseil d'Etat" and "Le rayonnement du Conseil d'Etat et le droit administratif à l'étranger." The first Part, after

chapters on the historical development of the Conseil, is in two sections entitled "Le Conseil d'Etat au contentieux" and "L'activité législative et administrative." This Part is written by Presidents of subsections of the *section du contentieux, maîtres des requêtes, auditeurs* and others. The second Part consists of chapters on administrative law written by authorities from seventeen countries in Europe, North and South America.

There is a very great amount of material on the large pages of this most impressive volume. The literature available in this country on the Conseil both in French and in English is rapidly increasing and this learned and expert volume will be invaluable to all students of the subject. It is to be admired and welcomed.

J. A. G. GRIFFITH.

THE BUSINESS LAW REVIEW: A JOURNAL OF COMMERCIAL LAW AND PRACTICE. Edited by CLIVE M. SCHMITTHOFF. Vol. I, 1954. [London: The Thames Bank Publishing Company, Ltd. 30s. annually.]

THERE has been rather an outburst of new law reviews since the end of the war. Most of these have been technical in character and therefore of limited interest outside the immediate field with which they are concerned. The *Business Law Review,* the first number of which I found of great interest and value, evidently aims to do something more. It is intended chiefly for members of the business community and will keep them in touch with the main developments of commercial law and will at the same time devote particular attention to those sections of the law which are in need of reform. At the same time, to judge from this number, there will be no writing down to the supposed ignorance of a lay readership, for the articles are well written and scholarly, and should be helpful to the legal profession as well as to the business community.

This issue contains valuable editorial notes, articles on Carriage of Goods by Air, the new Indian Company law, the Export Trade Terms of the International Chamber of Commerce, the new Merchandise Marks Act, and the Lawyer in Business. There are a series of notes on Company Practice, Accountancy and Taxation and American Business Law and on several of the more important recent decisions in commercial cases; also a number of short book reviews. We heartily welcome the *Business Law Review* and wish it all success.

C.

Books and Publications Received:—

THE JUSTICES' HANDBOOK. A Guide to Law, Evidence and Procedure in Magistrates' Courts. By J. P. EDDY, Q.C. Third Edition [London: Stevens & Sons, Ltd. 1953. xx and 260 pp. 18s. net.]

THE GROTIUS SOCIETY TRANSACTIONS FOR THE YEAR 1952. Problems of Public and Private International Law. Vol. 38. [The Grotius Society, 1 Pump Court, Temple, London, E.C.4. 1953. xxiii and 170 pp. Price to Non-Members, 25s.]

THE INTERNATIONAL LAW ASSOCIATION REPORT OF THE 45TH CONFERENCE HELD AT LUCERNE, AUGUST 31 TO SEPTEMBER 6, 1952. [1953. cxxvii and 317 pp.]

The Law of Wills. Third Edition. By Rupert Cross, m.a., b.c.l. [London: Stevens & Sons, Ltd. 1953. vii and 94 pp. 6s. net.]

Law Without Gravity. By J. P. C. Illustrated by Leslie Stark. [Chichester : Justice of the Peace, Ltd. 1953. x and 53 pp.]

Journal of Forensic Medicine. Vol. I, No. 1, July–September, 1953. [Published Quarterly by Juta & Co., Ltd., P.O. Box 30, Cape Town. 64 pp. Price 12s. 6d., Annual Subscription, 42s.]

Conduct and Etiquette at the Bar. By W. W. Boulton, b.a. [London: Butterworth & Co. (Publishers), Ltd. 1953. vi and 85 pp.]

Green's Death Duties. Second Cumulative Supplement to Third Edition. By H. W. Hewitt, ll.b. [London : Butterworth & Co. (Publishers), Ltd. 1953. Main Work and Supplement, 75s. net. Supplement alone, 5s. net, by post 3d. extra.]

If America Releases Vested German Private Property. By G. H. Morison. Separate Reprint of Schweizerische Handelszeitung.

The Juridical Evolutionism of James Coolidge Carter. By M. J. Aronson. Reprint from the University of Toronto Law Journal, Vol. X, No. 1 (1953). [The University of Toronto Press.]

The British Council Report for the Year 1952–53. [Price 2s. 6d.]

Chitty's Treatise on the Law of Contracts. Twentieth Edition. Sixth Cumulative Supplement (To August 31, 1953). By Barry Chedlow. [London : Sweet & Maxwell, Ltd. 6s. net. (Main Work and Supplement, £4 net.)]

Clerk and Lindsell on the Law of Torts. Sixth Cumulative Supplement to the Tenth Edition (to August 31, 1953). By Conrad Dehn, m.a. [London: Sweet & Maxwell, Ltd. 6s. net. (Main Work and Supplement, £4 net.)]

Konstam on Income Tax. Twelfth Edition. Cumulative Supplement No. 2, September, 1953. [Stevens & Sons, Ltd. 6s. net.]

Harrison on Death Duties. Second Edition. First Supplement (to September, 1953). [London: Sweet & Maxwell, Ltd. 5s. net. (Main Work and Supplement, £2 2s. net.)]

The United Nations and the Egyptian Blockade of the Suez Canal. A Study sponsored by the Lawyers' Committee on Blockades, 76 Beaver Street, 21st floor, New York 5, N.Y.

The Rent Acts. Seventh Edition. By R. E. Megarry, m.a., ll.b. [London : Stevens & Sons, Ltd. 1953. lxxxi and 736 pp. £2 10s. net.]

Guide to the Legal Profession. Fourth Edition. By Maurice W. Maxwell. [London: Sweet & Maxwell, Ltd. 1954. x and 136 pp. 7s. 6d. net.]

American-Swiss Private International Law. By Arthur Nussbaum. Bilateral Studies in Private International Law, No. 1. [Columbia Law Review, Columbia University, New York 27, N.Y. Sweet & Maxwell, Ltd. 46 pp. 7s. 6d. net.]

American-French Private International Law. By Georges R. Delaume. Bilateral Studies in Private International Law. No. 2. [Sweet & Maxwell, Ltd. 78 pp. 15s. net.]

Rudolf Laun, Leben und Werk. By Dimitri S. Constantopoulos. [Hamburg : Girardet & Co. 1953.]

Die Pariser Friedenskonferenz 1946 und die Griechisch-bulgarischen Beziehungen. By Dimitri S. Constantopoulos. [Hamburg: Girardet & Co. 1953.]

The Constitutional Privilege in Operation. By Leonard B. Bowdin. [Reprinted from the Lawyers Guild Review, Vol. xii, No. 3, Summer 1952.]

Status of Multilateral Conventions. (U.N. Publ. No. 1952. V. 2.) [H.M. Stationery Office. 1953. 30s.]

Reports of International Arbitral Awards. Vol. v. (U.N. Publ. No. 1952. V. 3.) [H.M. Stationery Office. 1953. ix and 611 pp. 45s.]

Underhill's Law Relating to Trusts and Trustees. Tenth Edition. Third Cumulative Supplement (containing all developments up to September 1st, 1953). By M. M. Wells, m.a. [London: Butterworth & Co. 1953.]

Rating Valuation Practice. By Philip R. Bean and Arthur Lockwood. Supplement to the Third Edition. [London: Stevens & Sons, Ltd. 1954. 20 pp. Main Work and Supplement 35s. net. Supplement alone 2s. 6d.]

Encyclopaedia of Planning, Compulsory Purchase and Compensation. Vol. I—Planning. Revision 17, October 31, 1953. Revision 18, January 31, 1954. Vol. II—Compulsory Purchase and Compensation. Revision 17, October 31, 1953. Revision 18, January 31, 1954.